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DISTINCTION BETWEEN LOCOMOTIVE WHISTLES AND WHISTLES ON STATIONARY ENGINES AS TO LIABILITY FOR FRIGHTENING HORSES.

It seems there is a prominent distinction between a locomotive whistle and the whistle of a stationary engine, at that point where the law comes to lay upon the owners of the respective whistles liability for the effects of such whistles in frightening horses on the public highway. The distinction lies in the purpose of the noise made by the two whistles, the locomotive whistle having as one of its main objects, that of frightening animals off the track and the purpose of the whistle of the stationary engine being to call employed men to and off work, or perhaps for other purposes, not, however, connected with any design to frighten animals. From this distinction it results that the owner of a whistle which is a part of a stationary engine is held to a stricter responsibility for frightening animals on the public highway than the owner of a locomotive whistle. This is the interesting rule laid down by the Supreme Court of Nevada in the recent case of Powell v. Nevada, etc., R. R. Co., 82 Pac. Rep. 96.

The principal case hinged on the correctness of the following instruction given for the plaintiff in the trial court: "The jury is instructed that the law distinguishes the necessary nature of a locomotive whistle from that of a stationary whistle, intended for the purpose of notice only; that locomotive whistles are necessary, among other purposes, for the purpose of frightening animals off the track, and to give notice of the approach of trains to persons about to cross the track at such a distance that the bell cannot be heard or the trains readily observed; and that in these and other cases their use upon railroads is both sanctioned and required by law; and that in such cases the usefulness of the whistle depends upon the alarming and frightening character of the noise it makes, and one of the purposes for which it is used is to frighten and to alarm. But the court instructs the jury the rule is different in respect to stationary whistles, intended for notice only, and that if used, if there is no necessity for constructing or operating them in such a way as to alarm or frighten any person or animal of ordinary gentleness, any unnecessary alarming or frightening use of them, if productive of injury to another, is wrongful, and the proprietors should be holden responsible for the injury."

In sustaining the correctness of this instruction the appellate court said: "That this instruction draws a correct distinction is apparent upon its face. The right of the appellant to maintain its shops within the city limits, and to use such a whistle as will not endanger people traveling on the street, for the purpose of calling, dismissing, or notifying its employees, is not assailed or denied. That the company may operate its machinery with all necessary fixtures and appliances is conceded, but this right must be exercised with reasonable care, and so as not to injure or imperil the safety of others. Streets are for the use of the public for travel and transportation. The harm and damage lies in the sounding of a whistle of unusual and unnecessary loudness and discordance in such proximity to a frequented thoroughfare as to frighten horses of ordinary gentleness when rightfully driven there. Locomotive whistles are usually blown at long distances from crossings, to warn and alarm before the bell can be heard. When nearing the track, people with teams are generally on the alert with eye and ear to detect the whistle, noise, or coming of trains, and on their approach either turn away, or have their horses under tighter rein and better control than is usual or is to be expected or required when driving at other places. In traveling the street away from crossings, drivers are not so liable to expect and guard against the frightening of horses by whistles of exceptional volume and discordance. If the use of such be proper on locomotives, as well as of fog horns at lighthouses, it is not necessary to maintain either on stationary engines so near to the street as to endanger people driving horses of ordinary gentleness. There is a place, as well as a time, for everything under the sun. Whether the appellant maintained and blew a whistle that was unnecessarily alarming, and a menace to defendant's right to drive

an ordinarily gentle horse along the highway undisturbed, and which occasioned the accident and injury he sustained, were questions of fact for the jury. Topeka Water Co. v. Whiting, 58 Kan. 642, 50 Pac. Rep. 877, 39 L. R. A. 90; Hill v. P. R. R. R. Co., 55 Me. 441, 92 Am. Dec. 601. In the latter case the court said: 'The whistle seems to be particularly adapted to give notice of the approach of trains to a crossing of a highway. The object then is to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk of collision and of alarm to horses.' To make the instruction law it was not necessary for any other court or legislature to have approved a similar one. As new conditions and circumstances arise in the affairs of men, decisions based on reason and justice must be made and promulgated to meet them. This theory and elasticity has long been the boast of the common law. By way of illustration and comparison, the court assumed and stated that the purpose of locomotive whistles was to frighten and alarm—a matter of common knowledge, and of which proof was not necessary, as claimed by counsel."

As suggested by the court in the principal case, there are no cases in which an instruction similar to the one here considered has been sustained. It is a new question and raises a distinction in the law of negligence as to the blowing of whistles, which seems to be based on very reasonable and logical premises. The principle can hardly be controverted that where two parties at different times and places make the same kind of a noise, which has a tendency to and does result in frightening horses on the public highway, greater responsibility should attach to the one who is not compelled by any necessity to make a noise of such a disturbing character, and one whose purpose is to frighten another from danger. Suppose, for instance, a private citizen traveling on the public highway should in the midst of a number of vehicles strike a shrill, piercing gong suddenly, sharply and in quick succession, where there was absolutely no occasion therefor, and such noise should frighten horses near him on the highway. Would he not be more culpable than a motorman on a street car who under similar circumstances made an exactly similar noise, but for the purpose of frightening a pedestrian who was in danger on the track ahead of him? Distinctions such as these serve to relieve the law of much of its apparent harshness and to make the law productive of more equal and exact justice in individual cases.

NOTES OF IMPORTANT DECISIONS.

APPEAL AND ERROR—QUESTIONS NOT RAISED ON ORIGINAL HEARING WILL NOT BE CONSIDERED ON A REHEARING.—Will questions not raised on the original hearing be considered on the rehearing? The Supreme Court of Nevada answers in the negative. Powell v. Nevada, etc., R. R. Co., 82 Pac. Rep. 96. In this case the decision of the court was rendered December 24, 1904, 78 Pac. Rep. 978. A petition for rehearing was filed January 23, 1905. The order granting the rehearing did not limit the purposes for which the rehearing might be had, although the main inducement for granting one was the statement in the petition that the court had omitted to particularly consider in its opinion plaintiff's instruction No. 10, the giving of which to the jury is said by the appellant to be the basis of one of its main assertions that the district court erred. The briefs and the arguments on rehearing covered the contentions previously advanced and much more, and went far beyond the petition itself, and further than the questions involved on the original apppeal. The court in deciding that it would not consider on the rehearing any questions not raised at the original hearing, cited in support of its position the following authorities: Schafer v. Schafer, 93 Ind. 586; Manor v. Jay County, 137 Ind. 367, 34 N. E. Rep. 959, 36 N. E. Rep. 1101; Tubbesing v. Burlington, 68 Iowa, 695, 24 N. W. Rep. 514, 28 N. W. Rep. 19; Goodenow v. Litchfield, 59 Iowa, 226, 9 N. W. Rep. 107, 13 N. W. Rep. 86; Minneapolis Trust Co. v. Eastman, 47 Minn. 301, 50 N. W. Rep. 82, 930; Mount v. Mitchell, 32 N. Y. 702; Kellogg v. Cochran, 87 Cal. 192, 25 Pac. Rep. 677, 12 L. R. A. 104; San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. Rep. 615, 835; Marine Bank v. National Bank, 59 N. Y. 73, 17 Am. Rep. 305. Other decisions sustaining this rule are: Jacksonville, T. & K. R. Co. v. Peninsular Co., 17 L. R. A. 33, 66, 27 Fla. 1, 157, 9 So. Rep. 661; Cloud v. Malvin, 108 Iowa, 52, 75 N. W. Rep. 645, 78 N. W. Rep. 791, 45 L. R. A. 209; McDermott v. Iowa Falls R. Co., 85 Iowa, 180, 52 N. W. Rep. 181; Farrell v. Pingree, 5 Utah, 530, 17 Pac. Rep. 453; Evansville v. Senhenn, 151 Ind. 42, 47 N. E. Rep. 634, 51 N. E. Rep. 88, 41 L. R. A. 734, 68 Am. St. Rep. 218; Payne v. Treadwell, 16 Cal. 247; Dougherty v. Henarie, 49 Cal. 686; Lake Erie R. R. Co. v. Griffin (Ind. App.), 57 N. E. Rep. 722; Lybarger v. State, 2 Wash. St. 552, 27 Pac. Rep. 449, 1029; Tolman Co. v. Bowerman, 6 S. Dak. 206, 60 N. W. Rep. 751;

Robinson v. Allison, 97 Ala. 596, 12 So. Rep. 382, 604; Florida Nat. Bank v. Ashmead, 23 Fla. 391, 2 So. Rep. 657, 665; Weld v. Johnson Mfg. Co., 84 Wis. 537, 54 N. W. Rep. 335, 998; Moore v. Beaman, 112 N. Car. 558, 17 S. E. Rep. 676; Hudson v. Jordon, 110 N. Car. 250, 14 S. E. Rep. 741; Western News Co. v. Wilmarth, 34 Kan. 254, 8 Pac. Rep. 104; Chamberlain v. N. E. R. R., 41 S. Car. 399, 19 S. E. Rep. 743, 996, 25 L. R. A. 139, 44 Am. St. Rep. 717; Coulter v. Portland Trust Co., 20 Oreg. 469, 26 Pac. Rep. 565, 27 Pac. Rep. 266; Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 41 Pac. Rep. 250, 851; Cincinnati v. Cameron, 33 Ohio St. 336; Hatto v. Brooks, 33 Miss. 575; Brooms Succession, 14 La. Ann. 67; Ryerson v. Eldred, 18 Mich. 490; Hayne, New Trial and Appeal, 879; Beck v. Thompson, 22 Nev. 421, 41 Pac. Rep. 1.

It might be interesting to know what the courts have said on this subject. Manor v. Board, 137 Ind. 394, 36 N. E. Rep. 1101: "Questions waived by silence of the original brief cannot be presented to this court on a petition for rehearing. Fleetwood v. Brown, 109 Ind. 567, 9 N. E. Rep. 352, 11 N. E. Rep. 779; Union School Tp. v. First Nat. Bank, 102 Ind. 464, 2 N. E. Rep. 194; Thomas v. Mathis, 92 Ind. 560." Goodenow v. Litchfield: "We feel constrained to hold that after a cause has been submitted, determined, and a rehearing granted, it is too late to raise for the first time such a vital question as that now made in the argument filed in aid of the petition for rehearing; the same not being filed as a matter of right, but simply as a matter of grace and favor of the court." Kellogg v. Cochran, 87 Cal. 192: "We have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted." Schafer v. Schafer, 93 Ind. 586: "The appellant, in order to avail himself of a question upon which to secure a judgment, must present that question in his brief upon the original submission." The Supreme Court of Florida in Jacksonville, T. & K. R. Co. v. Peninsular Co.: "The proper function of a petition for rehearing is to present to us any omission or cause for which our judgment is supposed to be erroneous. No new ground or position not taken in the argument submitting the cause can be assumed." Payne v. Treadwell: "The second ground upon which a rehearing is asked was not taken in the argument or in any of the briefs of counsel. It is too late to urge it now for the first time after the case has been considered upon the points to which the attention of the court was called, and a decision has been rendered."

The court in the principal case, after deciding what its view of the proper practice in this case was, said: "We understand that appellant, by citing Beck v. Thompson, 22 Nev. 421, concedes this to be the practice, and suggests that it ought not to apply to a matter that could not have been advanced or waived at the time of the first argument. We have cited more cases to show the uniformity of the rule, as a stronger reason for not departing from it."

HUSBAND AND WIFE—WHEN THE PRESUMPTION OF GIFT ARISES BETWEEN THEM.—The case of O'Hair v. O'Hair, recently decided by the Supreme Court of Arkansas, 88 S. W. Rep. 945, presents some interesting features. The court said:

"The parties to this suit are husband and wife. They have been married 32 years, and are parents of nine children, and in their old age have fallen into litigation with each other over lots 4, 5, and 6, in block 142 in the city of Little Rock. Lot 4 was purchased in 1887 by Mrs. O'Hair from her mother, contrary to the wishes of Mr. Hair. It was heavily incumbered, and the equity not of great value. Part of lot 5 was purchased by Mrs. O'Hair, or rather, she made a small payment on the purchase price while Mr. O'Hair was in Colorado for his health, and without his knowledge. The other parts of the lot were purchased subsequently. The titles were taken in Mrs. O'Hair's name, and the evidence shows that the mortgages were reduced and the purchase price paid by moneys derived from Mr. O'Hair, Mrs. O'Hair, their children, and the rents from the property. Lot 6 was purchased by Mr. O'Hair, paid for by him, and the title taken in his wife's name. He was then in embarrassed circumstances, and testifies that the title was put in her name to protect her and the family from anything which might happen to him, and to secure a home for themselves and their children. Mr. O'Hair is seeking to impress a trust upon lots 4 and 5 in his favor for the payments made for their purchase, which he claims was practically all made by him, and upon lot 6 on account of an understanding with his wife that it was to be held for their mutual benefit.

Passing the question of the sufficiency of the evidence to establish a trust, even if the transaction was between strangers (see Tillar v. Henry (Ark.), 88 S. W. Rep. 573), there is no trust in this case. Judge Eakin thus expressed the whole situation as presented by this record: 'This is only a claim for money advanced to buy a piece of land for the wife and improve it. It was a good thing for the husband to do, and may be supposed to have been done from a desire to protect her against want. The law will not raise any implied promise on her part to repay it. It will be presumed to be a gift.' Ward v. Estate of Ward, 36 Ark. 586. The principles controlling this case may be found in Milner v. Freeman, 40 Ark. 67; Robinson v. Robinson, 45 Ark. 485; Bogy v. Roberts, 48 Ark. 17, 2 S. W. Rep. 186, 3 Am. St. Rep. 211; White v. White, 52 Ark. 374, 38 S. W. Rep. 201; Rhea v. Bagley, 63 Ark. 374, 38 S. W. Rep. 1039, 36 L. R. A. 86; Culberhouse v. Culberhouse, 68 Ark. 145, 66 S. W. 658. See Rhea v. Bagley, as reported in 36 L. R. A. 86.'

FEDERAL CONTROL OF INSURANCE.

At the meeting of the American Bar Association recently held at Narragansett Pier, the majority of the members of the Committee on Insurance made a report to the general body in which they favored the passage by congress of an act which should provide for the federal supervision of insurance and prohibit the use of the mails to all persons, associations or corporations who should transact the business of insurance in disregard of state or federal regulations.

The validity of the proposed legislation depends of course upon the decision in the affirmative by the Supreme Court of the United States of the (to the majority of the committee at any rate) still mooted question, as to whether or not insurance is commerce and comes within the scope of the national legislation. The minority of the committee[1] (a minority of one as against four) relying upon the well known cases of Paul v. Virginia,[2] Liverpool Ins. Co. v. Massachusetts,[3] Hooper v. California,[4] New York Life Ins. v. Cravens,[5] and Nutting v. Massachusetts,[6] resolved this question in the negative. The majority,[7] however, although recognizing the importance of the cases mentioned, seemed inclined to the opinion that in them the question of insurance and the nature of the modern insurance policy and its commercial uses had not been fully considered, nor in them had any act of congress been directly passed upon, and that in the light of modern conditions and exigencies the Supreme Court of the United States might, and should recede from its former position. The majority report in fact asserted[8] that in none of the cases cited was there involved the validity of an act of congress. In none did the decision hinge upon the constitutional classification of the business of insurance. In none was there apparent in the record any accurate and detailed statement of facts in regard to the character and conduct of the business and the uses made of insurance; but the decisions it was urged "were based upon the misconception of the facts touching the contract of the business as they are recited in Paul v. Virginia,[9] and upon the theory that the business of insurance involves only the making of a contract between a citizen of one state and a corporation of another;" that "the statement of Mr. Justice Field in Paul v. Virginia,[10] that 'the policy does not take effect until delivered,' is not true in thousands of insurance transactions of to-day," that "it is true insurance is not a subject of trade and barter but neither is a telegram; it is not a commodity to be shipped or forwarded from one state to another and then put up for sale, but neither is a telephone message." The majority of the committee also argued that outside of the decisions of the Supreme Court of the United States insurance had always been deemed a commodity and commerce; that the supreme court itself had held in the case of Almy v. California[11] that a state stamp duty on a bill of lading was void as a regulation of commerce, and, in the recent and in many ways analogous lottery case,[12] had held that the carriage of lottery tickets from one state to another was interstate commerce and a fit subject not merely for congressional regulation but for congressional prohibition. They also advanced the strange though not novel proposition that it was within the province of the congress itself to determine what was and what was not interstate commerce and that that determination was conclusive on the courts.[13]

There can be but little doubt at the time of the handing down of the decision in Paul v. Virginia[14] the court and the public at large had but little idea of what the insurance business would become, of its great commercial and economic usefulness, and of the varieties of form which the policy would assume. It is also undoubtedly true that insurance has everywhere, except in the decisions of the Supreme Court of the United States been looked upon as a commodity, as property, as com-

[1] Mr. W. R. Vance of Charlottesville, Virginia.
[2] 8 Wall. 168.
[3] 10 Wall. 566.
[4] 155 U. S. 648.
[5] 178 U. S. 389.
[6] 183 U. S. 553.
[7] Messrs. Ralph W. Breckenridge, of Omaha, Neb.; Burton Smith, Atlanta, Georgia; Alfred Hemenway, Boston, Massachusetts; and Rodney A. Mercur of Towanda, Pennsylvania.
[8] See Report of Committee on Insurance Law, presented August 24, 1895.
[9] 8 Wall. 168. This case was decided in 1868.
[10] 8 Wall. 168.
[11] 24 How. 169.
[12] Champion v. Ames, 188 U. S. 321.
[13] See note 23 post.
[14] 8 Wall. 168.

merce.[15] It is true, as the majority of the committee so ably urge, that "the powers granted to congress are not confined to the instrumentalities of commerce or the postal system known or in use when the constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances.[16] It is true that the United States Supreme Court has held that a bill of lading is a subject of interstate commerce,[17] and it is also true that it is extremely difficult to distinguish between a lottery ticket and an insurance policy and to follow the reasoning of the court by which it holds the former to be an article of commerce[18] and yet (if absolute silence denotes affirmance) affirms, or at any rate refuses to reconsider or distinguish the long line of cases extending over a period of forty years by which the legal public has been taught to believe that the insurance policy and the insurance business is not.[19] The holding on the subject of bills of lading,[20] however, may, as is pointed out in the minority report, be easily explained and the bill of lading easily distinguished from the insurance policy if we but stop to remember that such bills have for a long time, if not always, been looked upon as property in themselves, as symbols of the thing carried, which pass title by delivery and take the place in a large measure of the goods themselves.[21] While it can hardly be believed that the members of the majority seriously considered or intended to seriously urge the last of the points mentioned, namely that the congress itself could determine what was and what was not interstate commerce by legislative action alone and that that determination would be binding upon the courts.[22] The proposition, indeed, would seem hardly to be deserving of serious comment had it not been reiterated over and over again by the supreme court of the nation.[23] To grant it, would be to grant the right to violate all the rules and theories of constitutional construction now maintained and to banish John Marshall day from the calendar of legal Saints' Days. If congress by its flat can decide what is and what is not interstate commerce, it can decide what else does and what else does not come within its supervision and control, and the Supreme Court of the United States loses its commanding position among the courts of the world and sinks to the level of the tribunals of last resort of England and of France. Not only would this be the case, but even the modern modified doctrine of state sovereignty and of state home rule would be destroyed forever. The cases cited in the report,[24] it is true, apparently bear out the contention. The statements made in them, however, when closely considered are *dicta* merely. Rather perhaps they are incautious statements made in connection with and in reference to subjects whose character as commerce had never seri-

[15] "Insurance is a Commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his law dictionary, defines the term as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' * * * It is common to speak of 'selling insurance.' It is a term used in insurance business, and law writers have to quite an extent adopted it." Opinion in Beechley v. Mulville, 102 Iowa, 602, 70 N. W. Rep. 107.

[16] Mr. Chief Justice Waite, in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1: "The American constitution has necessarily changed as the nation has changed; has changed in the spirit with which men regard it, and therefore in its own spirit." 1 Bryce, American Commonwealth, 389.

[17] Almy v. California, 24 How. 169.

[18] Champion v. Ames, 188 U. S. 321.

[19] Paul v. Virginia, 8 Wall. 168 (1868); Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566 (1870); Hooper v. California, 155 U. S. 648 (1894); New York Life Ins. Co. v. Cravens, 178 U. S. 389 (1899); Nutting v. Massachusetts, 183 U. S. 553 (1901).

[20] Almy v. California, 24 How. 169.

[21] "A bill of lading * * * stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can only be altered or changed, as we have seen, by a surrender of the original, and the contract is that the bill of lading must be surrendered before the property is delivered." Rothrock, J., in Garden Grove Bank v. Humeston & Shenandoah Ry. Co., 67 Iowa, 526; McClain's Cases on Carriers, 241-247.

[22] See Majority Report, page 19.

[23] Mr. Justice Catron, in License Cases, 5 How. 504, quoted by Justices Matthews and Field in Bowman v. Railway Co., 125 U. S. 465; Chief Justice Fuller, in Leisy v. Hardin, 135 U. S. 100, 125; Austin v. Tennessee, Sup. Ct. Rep. 132, 133. In the License Cases, 5 How 504, 12 L. Ed. 256, Chief Justice Taney says: "But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted and what excluded, and may therefore admit or not, as it shall seem best, the importation of ardent spirits. And inasmuch as the laws of cangress authorize their importation, no state has a right to prohibit their introduction."

[24] McCulloch v. Maryland, 4 Wheat. 316; License Cases, 5 How. 504; Bowmanv. Railway Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100, 125.

ously been questioned. The statement of Chief Justice Fuller which is quoted by the majority of the committee and which is to the effect that "We (the supreme court) cannot hold any articles which congress recognizes as subjects of interstate commerce, are not such,"[25] was made in connection with the traffic in intoxicating liquors as a traffic and not in relation to any form thereof, and, in the opinion, pains are taken to point out, as is done in a later case in relation to cigarettes and tobacco,[26] that the traffic and the articles under consideration had not merely been considered commerce by congress for a long period of years but had universally been so considered by the commercial world and in the American colonies from a very early time.[27] The position of the court was not that congress could determine what was and what was not interstate commerce and that that determination would be binding upon the states and upon the Supreme Court of the nation, but that the Supreme Court itself, while exercising its undoubted prerogative of judicial determination, would feel compelled to give at least some weight to and to take into full consideration the contemporaneous construction of the term "interstate commerce" at the time of the adoption of the constitution and that in passing upon the question whether an article or thing or trade was commerce at all, and not merely a nuisance, as disease infected meat, (and this was all that was done in the license cases and in the liquor case of Leisy v. Hardin), the Supreme Court would hesitate long in declaring that to be a nuisance and unworthy of the protection of the interstate commerce clause of the constitution, which congress had repeatedly held to be a fit subject for commerce. The cases were cases in which the Supreme Court of the United States was asked to compel congress to relinquish its rights and powers of protection and control and not to assume jurisdiction. They were cases in which the jurisdiction of congress had before always been assumed as a matter of course, not cases in which it had been doubted for nearly forty years. The statements were made while the court was passing, not on the question as to whether the articles or transaction considered were interstate as opposed to intra-state commerce, but while passing upon the question as to whether they were commerce, that is to say property at all. It was taken for granted in the case of Leisy v. Hardin, for instance, that the packages of liquor were articles of traffic, that they were bought and sold, that they were in the original package, and the point in relation to which the statement quoted was made, was merely, are they, though articles of traffic and though original packages so injurious to the people of the nation generally, that like the germs of disease they have ceased to be property and entitled to the protection of the interstate commerce clause of the constitution.[28]

The question then is this, will the Supreme Court of the United States recede from the

[25] Leisy v. Hardin, 135 U. S. 100, 125, 10 Sup. Ct. Rep. 690, 30 Cent. L. J. 385, 473, 480, 493. The same is true of the statement of Mr. Justice Catron and Chief Justice Taney in License Cases, 5 How. 504.

[26] Austin v. Tennessee, 21 Sup. Ct. Rep. 132.

[27] "That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation?" Leisy v. Hardin, 10 Sup. Ct. Rep. 684. "Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the states. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day, tobacco has been one of the most profitable and important products of agriculture, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of the opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale. * * * Whatever may be our individual views as to its deleterious tendencies, we cannot hold that any article which congress recognizes in so many ways, is not a legitimate article of commerce." Mr. Justice Brown in Austin v. Tennessee 179 U. S. 343, 21 Sup. Ct. Rep. 182.

[28] The supreme court has repeatedly held that that which is a common nuisance or injurious to health or morals, is not property or the subject of interstate commerce. Bowman v. Chicago, etc., R. Co., 125 U. S. 489; Leisy v. Hardin, 135 U. S. 100; Missouri, etc., R. Co. v. Haber, 169 U. S. 613; Kimmish v. Ball, 129 U. S. 217; Hannibal, etc., R. Co. v. Husen, 95 U. S. 465.

position taken in the case of Paul v. Virginia[29] and in the line of decisions which, by *dicta* at any rate, and in many instances by positive holdings have for nearly forty years followed that case,[30] or will that tribunal yield to the supposed exigencies of the hour and to the undoubted fact that, although the utterances of congress are not final on the question of what constitutes interstate commerce, under an elastic constitution and with a progressive court, the construction and opinion of the economic and commercial world should be allowed some weight in the determination of the meaning of doubtful words and phrases. So, too is the question before us as to whether or not the so-called Lottery Case[31] has opened the way for such a determination, or for congressional action upon the subject of insurance, even without the determination.

The controlling opinion in the Lottery Case is an unsatisfactory one at the best. Opposed to it is the opinion of four dissenting judges.[32] It, contrary, no doubt to the expectations of the majority of the American bar, decides that lottery tickets are the subjects of interstate commerce, and yet makes no reference whatever to the case of Pau v. Virginia[33] and the other insurance cases which have followed it,[34] and which were deemed to be of such moment by the four dissenting judges.[35]

What is to be inferred from the decision? What was the intention of the court in promulgating it? What light does it cast upon this much mooted and all important question of interstate commerce? Was the intention to impliedly overrule the insurance cases in question and to pave the way for a new line of decisions, or was it rather to adopt a new principle, a new theory of congressional power and jurisdiction. The latter, to the writer, is the only logical conclusion to be derived from a perusal of the decision in question, if examined in connection with the insurance cases which it ignores, and, if this be the case, the decision is of great importance and will be a leading one for many years to come. If the latter is the fact, however, it was unnecessary for the court to pass upon the question as to whether a lottery ticket was strictly speaking a subject of interstate commerce, and the nature of the contract which it evidences, or to refer to or review the insurance cases, and if this be so, since the insurance cases were not referred to or distinguished, it is unfortunate that the question of commerce was passed upon at all.

The underlying and controlling theory of the lottery cases, indeed, appears to have been, not so much that lottery tickets were the subjects of interstate commerce, as that they were common nuisances, and no property at all, and that, being nuisances and no property, the owners of them had no rights which congress was bound to respect; that congress has a governmental duty, as a residuary trustee of the welfare of all and of all of the several states, and as the only agency with direct supervision over national and interstate matters and lines of communication, to supplement the police activities of the constituent states. For, if indeed, lottery tickets were really deemed property and the subjects of interstate commerce, then the refusal to allow their transportation, and the activity of congress in destroying their value would be nothing more or less than the destruction of property without due process of law, for it will be borne in mind that the act in question did not seek to regulate but to destroy.

It is held in the opinion "that the power of congress does not stop merely at regulation, in so far as the transportation of any particular article or product is concerned; that it is commerce generally concerning which congress has merely the power to regulate, and that it does not appear that in a general scheme of regulation it may not absolutely forbid interstate traffic in cases where the welfare of all of the states seem to demand the prohibition. The power of congress to regulate," the court says, "is plenary, complete in itself and subject to no limitations except such as may be found in the constitution, and the only clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from

[29] 8 Wall. 168.
[30] See cases cited in note 19, *ante*.
[31] Champion v. Ames, 188 U. S. 321.
[32] Chief Justice Fuller and Justices Brewer, Shiras and Peckham.
[33] 8 Wall. 168.
[34] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Hooper v. California, 155 U. S. 648; New York Life Ins. Co. v. Cravens, 178 U. S. 389; Nutting v. Massachusetts, 183 U. S. 553.
[35] See dissenting opinion of Chief Justice Fuller.

state to state is the provision which forbids the taking of property without due process of law, and it cannot be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so congress, for the purpose of guarding the people of the United States, against 'the widespread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, congress only supplemented the action of those states—perhaps all of them—which, for the protection of public morals, prohibit the drawing of lotteries as well as the sale or circulation of lottery tickets within its limits. It said in effect that it would not permit the declared policy of the states which sought to protect their peoples against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." An analogy is also drawn between the act under consideration and the various congressional statutes creating quarantines and regulating the transportation of diseased meats and infected articles.[36]

This is the only theory on which the case can be logically reconciled with those which precede it and which, under such decisions, would justify congress in interfering in insurance matters. The mooted question as to what does and what does not constitute interstate commerce is not in it necessarily involved. The only thing necessary is that the thing or practice aimed at is against the public policy or under legislative ban, or, what is the same thing, a nuisance in the states in which it is sought to be introduced. To make this theory applicable to the subject of insurance, however, the subject, the nature of the policy and all that fundamentally pertains to the business should, as suggested in the minority report, be matters of uniform state action in the first instance and a public policy of insurance thus instituted which should be as general and far-reaching as the public policy of the states in regard to the lottery business. The difficulty in the way of federal legislation upon the subject of insurance and the bringing of the question under the decision in the lottery cases at the present time is, that in the lottery cases the original legislation was not attempted by congress but, on the other hand, what contracts were and what contracts were not lotteries and against the public policy of the respective states had long been decided and known. Such contracts had long been considered injurious in all of the American states, and congress simply forbade the transportation of the other tickets issued in furtherance of that which was everywhere under the ban of the law. Under the analogy, therefore, the legislation of congress on the subject of insurance must be secondary and supplementary, not basic, primary or fundamental. But the subject is a serious one. It involves a question of broad national public policy which is far-reaching in its consequences. It is the old question of state sovereignty, only in a modern form. If the theory be carried to its logical conclusion, home rule, as far as the several states is concerned, is directly jeopardized. If it be once conceded that congress has the power "to drive a traffic which is confessedly injurious to the public morals or welfare out of commerce among the states,"[37] a wide power of local regulation is conceded to that body restrained and controlled only by the social and political ideas of the members of the supreme court of the nation, or rather of the majority of the judges of which the tribunal at the time happens to be constituted. It can indeed be perfectly conceivable that a traffic or business, such as was formerly the lottery business, or slavery, or the sale of intoxicating liquors, of tobacco, of oleomargarine, or of firearms, might be sanctioned in a large number of the states, but repudiated by the political majority or by the political party whose president or presidents had the nomination of the members of the supreme court in their hands, and that, under the decision in question, the majority could absolutely deny to

[36] Opinion of Harlan, J., in Champion v. Ames, 23 Sup. Ct. Rep. 327, 328.

[37] See opinion of Harlan, J., in Champion v. Ames, 23 Sup. Ct. Rep. 321.

such states, for the furtherance of such business, the agencies of interstate commerce. And yet this is the holding of the Lotteries cases.

Much more dangerous, however, and open to objection is the attempt on the part of the majority of the committee on insurance to bring about direct federal regulation of the subject of insurance, and for that purpose, and in order that the same may be possible to induce the supreme court of the nation to repudiate the insurance cases already decided, by an exercise of mental gymnastics to follow the analogy of the Lottery cases and to hold that insurance is interstate commerce.

It would indeed seem that the experience of recent years, in relation to the matter of the regulation of the trusts and the prevention of unlawful combinations, had sufficiently demonstrated the inconveniencies of a dual authority and shown that the declaration that an article, or thing, or business is interstate commerce, often tends to hinder and prevent rather than to facilitate regulation and control.[38] So, too, although the argument that insurance companies are and must be essentially national in their character, has in it much force at the present time, it is a force which is gradually lessening in its power. The majority of our states are already in area, and will soon be in population and influence, empires. The kingdom of Belgium has a population of over seven millions of people, with an area of a little over eleven million square miles. The state of Minnesota has an area of over eighty-three thousand square miles, New York of over forty-nine thousand, Montana of over one hundred and forty-six thousand, and Texas of nearly two hundred and sixty-six thousand. There is a dangerous tendency to yield too much to the federal government. There is a point beyond which it is not safe to ignore the desire and necessity for home rule, a direct voice in legislation and the determining of local policies, which is inherent in every community. In the matter of insurance the doctrine of *stare decisis* may be well worth considering. After all, is there not much of wisdom in the language of Chief Justice Fuller, when in the case of United States v. E. C. Knight Company,[39] he said: "It is vital that the independence of the commercial power and of the police power, and the delimination between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation and the autonomy of the states as required by our dual form of government; and acknowledged evils however grave and urgent they may appear to be had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality." And is there not also much wisdom in the remarks of Mr. Justice Brewer of the same court, when in an address deliverd before the graduating class of the law department of the University of Wisconsin, in the year 1901,[40] he said: "I might go on and enumerate other like illustrations, such as the effort to make the commercial law uniform by giving to congress full control thereof, and to give to that body jurisdiction over all insurance companies. * * * But I have presented enough to show that there is in various directions an increasing effort to centralize power at Washington and make the national government more far-reaching in its functions. The constitutional tinkerer is abroad in the land. To my mind there is danger in this tendency. If it continues it will end in a single centralized government instead of that unique federal system under which we have hitherto lived and prospered. * * * A centralized government may be more efficient, more powerful, and yet it is not that form of national organization which makes the most of the individual. * * * I am frank to say that I do not believe popular government is possible in a great nation, under any other than a federal system. Take this nation, now numbering over seventy millions of people, and extending from ocean to ocean, from the lakes to the gulf, if the people everywhere become accustomed to look to Washington for the laws to control their lives and their business, it will not be long before, although the forms of liberty may be preserved, the

[38] Compare United States v. E. C. Knight Co., 156 U. S. 1; Addyston Pipe Co. v. United States, 175 U. S. 211.

[39] United States v. E. C. Knight Co., 156 U. S. 1.

[40] University of Wisconsin Commencement Annual for 1901, p. 17, *et seq.*

real power will be vested in an individual or a limited number who adroitly manipulate the politics of the land to their own advantage. The boss in local politics who, notwithstanding all denunciation, seems to be able to maintain himself in power, will be succeeded by the boss in the nation. More than this, there is a constant tendency in centralized power to corruption. Human nature has not yet become so strong, so pure, that it is beyond the reach of temptation. We are living in a day when wealth is accumulated with great rapidity, and if power be centralized you may be sure that enormous temptations will surround those who are temporarily entrusted with such power. Even to-day, when only a limited amount of power is vested in the national government, every one sees at Washington during each session of congress a multitude surrounding that body, seeking in one way or another to induce such legislation as will inure to their advantage. It goes almost without saying, that Washington is to-day the great lobby camp of the world. * * * With every addition of power to that body there will come an added number of those seeking to influence legislation, and among them will be the bad as well as the good, and congress will be constantly surrounded by more and more influences which are hurtful and corrupting. A safer and a better way is to keep power as far as possible confined to the several localities. It is hard to corrupt a town meeting. It is composed of neigbors who live together and watch each other continually from day to day, and whose interests are all so closely connected that honesty on the part of each is felt to be the best policy, in fact a necessity, of their harmonious living together. But when the representative is three thousand miles away from home, beyond the immediate watch of his neighbors and surrounded by all the inducements and temptations that wealth can furnish, it is one of the inevitable laws of our weak humanity that more and more will be the number of those who yield to these temptations."

ANDREW ALEXANDER BRUCE.

University of North Dakota.

DEEDS—USE OF ASSUMED NAME AS GRANTOR AND GRANTEE.

CHAPMAN v. TYSON.

Supreme Court of Washington, August 7, 1905.

Where a father purchased lands with his own funds, and held exclusive possession thereof, exercising acts of ownership over the same, the bare fact that h used the name of his infant son in making the purchase, falsely representing it to be his own name, but without using any of the son's funds, did not work a forfeiture of his title, nor create any ownership or title, legal or equitable, in the son.

Where a father purchased lands with his own funds for himself, but used the name of his infant son in the transaction, falsely representing such name to be his own name, a conveyance made by him under the assumed name passed title to his grantee, and could not be successfully attacked as a forgery.

CROW, J.: Action by appellant, W. T. Chapman, as administrator of the estate of Porter L. Denison, deceased, to recover possession of, and determine the title to, real estate in Whitman county. In the second amended complaint it was alleged that Porter L. Denison was, on May 9, 1886, seized and possessed of, and was owner of, the fee-simple title to the northeast quarter of section 7, and lots 1 and 2 of section 8, in township 19 N., of range 46 E., W. M., and that on said date he was also seized and possessed of, and was the owner of, the equitable title to the northwest quarter of section 7 in the same township and range; that said Porter L. Denison died intestate in March, 1898, being then a minor about 17 years of age; that at the time of his death and at all times subsequent to said 6th day of May, 1886, he was the owner of, and entitled to the immediate possession of, all of said real estate; that the several respondents had wrongfully and unlawfully entered upon said land, had dispossessed said Porter L. Denison, and wrongfully withheld possession from him until the date of his death, and still wrongfully withhold said possession from appellant. In this opinion we will designate the northeast quarter of section 7 and lots 1 and 2 of section 8 as "tract 1," and the northwest quarter of section 7 as "tract 2." The respondents George Strange and wife, in their separate answer, claim title to and possession of the north 66 rods of said tract 1; the respondents William Tyson, Walter Tyson, and Byron Tyson, by their separate answer, claim possession of and title to the remaining portion of said tract; and the respondents Henry D. Kay and wife claim possession of and title to all of said tract 2. Many facts fully showing the entire chain of title are pleaded, and disclosed by the evidence, but we will mention such facts only as are of controlling influence in settling the matters in dispute.

As to tract 1, it is conceded that on May 9, 1886, a deed was executed for said lots 1 and 2 in sec-

tion 8 by the owners of the fee-simple title thereto, one James B. Tyson, now deceased, and Mary A. Tyson, his wife, to P. L. Denison; and that on December 1, 1885, a deed was executed for the northeast quarter of section 7 by the owners of the fee-simple title thereto, the Northern Pacific Railroad Company, to Porter Leroy Denison. At the time of the execution of these deeds Porter L. Denison was a minor about four or five years of age, residing with one Lewis H. Denison, his father. Said Lewis H. Denison, afterwards using the name of, and representing himself to be, Porter L. Denison, conveyed all of said tract 1 to said James B. Tyson, from whom respondent Strange and wife deraign title to the north 66 rods, and respondents William, Walter, and Byron Tyson deraign title to the remainder of said tract 1. As to tract 2, it is conceded that on December 1, 1885, the Northern Pacific Railroad Company, being owner thereof, executed a five-year contract of sale therefor to Porter L. Denison for $859.05, payable $158.70 cash and the remainder in five annual installments. This contract was never recorded, but on January 4, 1887, was assigned to James B. Tyson by said Lewis H. Denison, who in making such assignment used the name of, and claimed to be, Porter L. Denison. Thereafter, on July 8, 1890, the Northern Pacific Railroad Company executed and delivered a deed for said tract 2 to said James B. Tyson, from whom the respondents Kay and wife deraign title. The respondents separately pleaded possession and title in themselves to the various portions of said lands, as above mentioned, and alleged that all of said lands were purchased by said Lewis H. Denison in the name of Porter L. Denison; that when he so purchased the same of said James B. Tyson and said Northern Pacific Railroad Company he claimed his name was Porter L. Denison; that he purchased said real estate for himself; that he went into possession thereof, and at all times exercised exclusive acts of ownership over the same, until said sales were made by him; that at the time said Northern Pacific Railroad Company and James B. Tyson sold said lands to said Lewis H. Denison they understood and believed his name to be Porter L. Denison, and understood and believed that he was Porter L. Denison, and sold the land to the identical person so representing himself to be Porter L. Denison; that at said time Porter L. Denison, now deceased, was a minor of only about four or five years of age, incapable of contracting; that he knew nothing of said purchases, and that the same were not made for him, in trust or otherwise. Appellant denies all these allegations, claiming said lands were purchased for said minor, Porter L. Denison, with funds which he inherited from his deceased mother, the first wife of said Lewis H. Denison. The evidence, however, fails to show that Lewis H. Denison used any money of said minor in making said purchases. At the time of said purchases said Lewis H. Denison was a widower, but afterwards, and before the execution of said deed for tract 1 to James B. Tyson, he married one Anna Denison, who joined him in said deed as the wife of Porter L. Denison. Said deed to tract 1 was acknowledged before one O. E. Williams, a notary public, and said assignment of said railroad contract for tract 2 was acknowledged before one Thos. R. Tannatt, a notary public; and as to each transaction the notaries severally testified that Lewis H. Denison represented himself to be Porter L. Denison, while said Tannatt, who had previously known Lewis H. Denison, also testified that he had known him as Porter L. Denison. The trial court made findings of fact in exact accordance with the claims of respondents, to the substantial effect that Lewis H. Denison purchased all of said lands himself with his own funds, at the time falsely claiming his name to be Porter L. Denison; that his grantors sold to him personally, but under said name of Porter L. Denison, believing that to be his name; that he held exclusive possession of said real estate, exercising acts of ownership thereover until he sold the same; that when he sold and conveyed tract 1 by deed and tract 2 by assignment of the railroad contract, as above mentioned, he represented himself to his vendee, James B. Tyson, and the notaries to be Porter L. Denison, claiming his name was Porter L. Denison; that said claim was believed and accepted by all of said parties; that the said Porter L. Denison, his son, was then only about four years of age, and knew nothing of said purchases, was incapable of contracting, paid nothing for said lands, and never had any legal or equitable title thereto. On these findings of fact, and others not material to mention, conclusions of law were made, and a judgment was entered quieting the title of Strange and wife to the north 66 rods of tract 1, the title of William, Walter, and Byron Tyson to the remainder of said tract 1, and the title of Kay and wife to all of tract 2. From the said judgment this appeal has been taken. After a most careful examination, we are firmly convinced that all findings of fact made by the trial court are fully sustained by competent evidence, and we will not disturb the same.

Numerous assignments of error are made by appellant, but in substance they all rest upon the propositions (1) that the ownership of, and the title, either legal or equitable, in and to, all of said land was in said minor, Porter L. Denison, from the date of said purchases until his death; (2) that the conveyances made by Lewis H. Denison were forged, and that a forged deed conveys no title whatever. As to the first proposition, we will simply suggest under the findings made by the trial court, which are approved by us, the facts fail to sustain appellant's contention as to the alleged ownership and title, either legal or equitable, of said decedent. When said real estate was purchased by said Lewis H. Denison, it became his property. The title did not fail to pass to him simply because he assumed the name

of Porter L. Denison, or because that particular name happened to belong to his son, then four years of age, who had nothing whatever to do with the transaction. Under the facts found and proven we cannot arrive at the conclusion that said instruments were forged. At the time Lewis H. Denison executed them he did not assume to act as attorney in fact or guardian for his minor son; neither did he represent that the signatures to said instruments were those of his son. The parties who dealt with him knew he himself had made the signatures, and knew he claimed to do so in his own behalf, and not as representing his son, or any other person. He executed said conveyances under a name which he had assumed when he purchased the property. James B. Tyson, his grantee, was the identical person from whom he had previously purchased lots 1 and 2 of section 8 under said assumed name. Whatever criticism may be made on the acts of said Lewis H. Denison in executing said instruments, most certainly it cannot be successfully contended that such instruments were forgeries. Queen v. Martin, 5 Q. B. Div. 34; Weihl, Probasco & Co. v. Robertson (Tenn.), 37 S. W. Rep. 264, 39 L. R. A. 423. It appears from the evidence (notwithstanding some conflict), and was found by the trial court, that in these transactions Lewis H. Denison assumed the name of Porter L. Denison, and was known as Porter L. Denison by those who dealt with him. True, he had a four year old son bearing the same name. It is not uncommon for father and son to bear the same name; and, were we to assume that all the parties with whom Lewis H. Denison dealt knew the son, and also knew his name, such knowledge would amount to nothing, as it would simply be a case of father and son with the same name. When a father and son have the same name, and a conveyance of land is made without designating whether to the father or son, the law will presume that the father was intended for the grantee, in the absence of proof to the contrary. Peabody v. Brown, 10 Gray, 45; Stevens v. West, 51 N. Car. 49; Graves v. Colwell, 90 Ill. 612; Fyffe v. Fyffe, 106 Ill. 646. The parties dealing with Lewis H. Denison knew him as Porter L. Denison. Had they also known the name of his son, then only four years of age, certainly it would not have been even suspected by them that said son owned said real estate. The presumption would be one of ownership in the father, and the evidence, instead of overcoming such presumption, greatly strengthens it. We then have a state of facts in which Lewis H. Denison himself purchased and sold this real estate, and in so doing assumed the name of Porter L. Denison. The law is well settled to the effect that a conveyance to and by a person under an assumed name passes title. Wilson v. White (Cal.), 24 Pac. Rep. 114; David v. Williamsburg City Fire Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418; Salmer v. Lathrop, 10 S. Dak. 216, 72 N. W. Rep. 570; Andrews v. Dyer, 81 Me. 104, 16 Atl. Rep. 495; Thomas v. Wyatt, 31 Mo. 188. 77 Am. Dec. 640; Weihl, Probasco & Co. v. Robertson, *supra*. In Wilson v. White, *supra*, plaintiff had made a deed to one John Warren, whose real name was Hardwick, who paid no consideration, but acted in the interest of plaintiff, assuming the name of Warren at his request, and for that occasion only. Afterwards plaintiff introduced to the defendant said Hardwick or Warren by said name of Warren, as the man who held the title, and an arrangement was made by which Warren made a deed to defendant. It was held that the conveyance to and by Hardwick under the assumed name of John Warren passed title. In Weihl, Probasco & Co. v. Robertson, *supra*, Robertson, being the owner of certain real estate, executed a deed therefor to C. Phillips, a fictitious name. Afterwards he himself, assuming said name of C. Phillips, executed a trust deed to one Grayson. It was held that, although the deed from Robertson to C. Phillips was void, as being made to a fictitious person, nevertheless the trust deed afterwards executed by Robertson himself under the name of C. Phillips was held valid, he still being the owner of said real estate, and having assumed said name for such purpose. In David v. Williamsburg, etc., Co., *supra*, it appeared that certain property was conveyed by one Henry J. David, the owner thereof, by deed in form to one Marks David, a fictitious person. Then afterwards, under said name of Marks David, he conveyed the same to plaintiff. It was held that the subsequent conveyance by Henry J. David under the name of Marks David was valid, and passed title, he assuming such fictitious name of Marks David for that purpose. A careful examination of these various authorities clearly sustains the position of the trial court in holding that the transfer to Lewis H. Denison under the name of Porter L. Denison and the subsequent conveyance by him under the same name to James B. Tyson, were valid, and passed title.

The judgment is affirmed.

NOTE.—*Use of Fictitious Name as Affecting Validity of Instrument.*—The above case presents an interesting question and one which may be met with in the ordinary course of practice, in some one of its phases at least.

Of Contractors, Grantors and Mortgagors.—"A contract or obligation may be entered into by any who may choose to assume the law looks only to the identity of the individual, and when that is clearly established the act will be binding upon him. *Re* Snook, 2 Hill, 566—*dictum*." One who contracts with another under a name he represents to be his name is estopped from denying or repudiating the same for the purpose of relieving himself from the obligation of the contract, and cannot avoid liability thereon. Where his identity is in question, by claiming that the name held out to be his name was not the name by which he was best known to the world. Preiss v. Le Poiedevine, 19 Abb. N. Cas. 123. And a conveyance by the true owner of the property is good between the grantor and grantee and will transfer the title whatever name he may have adopted therein. Fallon v. Keho, 38

Cal. 44, 99 Am. Dec. 347; Wilson v. White, 84 Cal. 239; Wakefield v. Brown, 38 Minn. 361. In Preiss v. Le Poiedevine, *supra*, it was held that where one who executes a deed, using the name of another who owned the property conveyed, which deed contained a covenant of warranty, may be held liable thereon, not as a breach of the covenant upon the ground that he was the agent of the owner, but upon the ground that the covenant was his own, made under a name assumed by him for that purpose. So it was held in Mackey v. Cole, 79 Wis. 426, that a chattel mortgage made by a person under an assumed name would be valid as between the mortgagor and mortgagee, for the reason that the mortgagor would be estopped from saying that a name assumed for a fraudulent purpose was not his true name. See Alexander v. Graves, 25 Neb. 453.

Cases Relating to Grantees, Patentees, Etc.—It is held in Staak v. Syelkon, 12 Wis. 235, that a deed made by an agent for another to whom he procured a conveyance of the property in question under a wrong name made to a third person, in the name used in the deed to his principal, transfers no title to the third person, whether he acted in ignorance of the law or in good or in bad faith. So in Southam, 16 Ind. 190; and Douthitt v. Stinson, 63 Mo. 268, it was held that a conveyance to a supposed corporation, which never had any existence under color of authority by the name used by it, does not divest the grantor of his title. And if a grantee is a person in existence and identified, and delivery is made, it makes no difference by what name he is called. Wilson v. White, 84 Cal. 239. See Blinn v. Cheesman, 49 Minn. 140. And patents issued to fictitious persons of public lands are invalid, there being in fact no grantees capable of taking title. United States v. Southern Col. Coal Co., 18 Fed. Rep. 273. But while a patent issued to a person not in existence is void, if the patentee used a name different from his own to designate himself where he bought property, and made the entry in that name for himself, merely using it as he would the one by which he was usually known, and indorses the patent in that name with the same view, the title will inure to the transferee. Thomas v. Wyatt, 31 Mo. 138, 77 Am. Dec. 640. See Fitchner v. Fidelity Mut. F. Assn. (Iowa), 26 Ins. L. J. 326; Bassett v. Daniels, 136 Mass. 537. And a bill of lading issued in the name of a fictitious or non-existing firm imposes no liability upon a railroad company. Bank of Tupelo v. Kan as City, M. & B. R. Co., 99 Ala. 416. See also Muskingum Valley Turnp. Co. v. Ward, 13 Ohio, 120, 42 Am. Dec. 191. As to makers and drawers of negotiable paper, see Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240, where it is held that where one who makes notes in a fictitious name, which he had not used or held himself out as using in the transaction of other business, and by which he was not known, is not liable on a contract thereon to one who buys them of the payees though he was an innocent holder.

So with Regard to Payees.—A note made payable to a fictitious person or bearer is no defense against a *bona fide* holder thereof receiving it without notice of that fact before it became due for value. Lane v. Kreckle, 22 Iowa, 399. And that the maker of a note did not know that the payee therein was fictitious is no defense against such a holder, as by making it payable to such person he avers its existence, and is estopped against an innocent holder to assert the fiction. Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 511. See also Armstrong v. Nat. Bank, 46 Ohio St. 512, 6 L. R. A. 625; Shipman v. Bank, 126 N. Y. 318, 12 L. R. A. 791; Irving Nat. Bank v. Alley, 79 N. Y. 536; Maniort v. Roberts, 4 E. D. Smith, 83. A bill of exchange running to a fictitious payee is the same as if drawn payable to the bearer. Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; Rodgers v. Ware, 2 Neb. 29; Willet v. Phoenix Bank, 2 Duer, 130. And it is no defense that the drawer of a bill of exchange did not know the payee to be fictitious against a *bona fide* holder thereof when the drawer was induced to so make it by the false representations of the correspondent to whom he transferred it with instructions for its disposition. Kohn v. Watkins, *supra*. So an indorser of a bill of exchange is bound by his indorsement though the bill is made to a fictitious payee. *Ex parte* Clark, 3 Bro. Ch. 238; Weihl, Probasco & Co. v. Robertson (Tenn.), 37 S. W. Rep. 264, and Cleveland Nat. Bank v. Same, 39 L. R. A. 423.

JETSAM AND FLOTSAM.

TO WHAT EXTENT A LEGISLATURE MAY DELEGATE ITS POWERS TO A BOARD OR COMMISSION.

The Supreme Court of Oregon, in the case of State v. Briggs, 77 Pac. Rep. 750, was recently called upon to decide on the constitutionality of a law prescribing the qualifications for, and regulating the practice of the trade of barber, which was attacked on the ground that it delegated legislative power to the board of examiners. The law in substance provides for the appointment of a board of examiners, defines their powers and duties, among which are the making of by-laws and the prescribing of the qualifications of a barber, declares that it shall be unlawful for any person not registered, to practice the business of a barber, or conduct a barber school, without the sanction of the board and prescribes the penalty for its violation. It is conceded in all the decisions involving this point and by all text writers that more or less of the details necessarily involved in giving the legislative intention the force and effect of law must be left to the administrative authorities. The legislature is in session but a short portion of the year; it cannot legislate for each contingency that may arise, and unless there is some means provided to determine questions of a *quasi*-legislative character, the law, for the most part, must be inoperative. Nearly all the opinions upon the point in question state in substance that "the legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Thus the question in all cases is to what extent the legislature may make the operation of law depend upon facts and circumstances to be determined by a board appointed for that purpose.

In the case of State v. Briggs, the giving to the board of barber examiners the above powers was held not to be a delegation of legislative authority. Let us take up briefly some of the cases roughly parallel to the above decision, although it is hardly feasible to classify them in any satisfactory way.

The state of South Carolina authorized the Board of Agriculture to determine who should have the right to mine phosphate rock from the property of the state, and to license those whom the board in their discretion thought would work for the best interests of the state. P. R. Co. v. Hagood, 30 S. Car. 519. The pure food law of Indiana provides that "within ninety days after its passage the board of health should adopt measures to facilitate the law's enforcement and prepare rules regulating minimum standards of foods, define specific adulterations," etc. Isenhou

v. State, 157 Ind. 517. Both of these laws were upheld. The federal court decided that the act of congress authorizing the Secretary of War to give notice for the alteration of bridges that he believed to be unreasonable obstructions to navigation, and empowering the District Attorney to prosecute parties refusing to comply with such notice is not unconstitutional, as vesting the secretary with legislative power. United States v. City of Moline, 82 Fed. Rep. 592. In Massachusetts, the legislature, having the power of determining the qualifications of officers not otherwise provided for in the constitution, has the authority to delegate such power to the civil service commission. Opinion of Justices to House of Reps., 138 Mass. 601. The legislature has power to confer upon the board of health of a city the authority to enact and enforce ordinances. Peo v. Justice, 7 Hun, 214. There are many cases where boards of health have been given the power to prescribe the qualifications of a doctor or dentist, etc., and to decide which colleges should be accredited and which should not. Hildreth v. Crawford, 65 Iowa, 339; *Ex parte* McNulty, 77 Cal. 164. Another large class of cases involving the question under discussion arises from the creation of railroad commissions. General laws have been passed for the regulation of rates charged by railroads which delegate to a commission the power to determine what constitute reasonable rates. Such laws have uniformly been held constitutional. Tilley v. Railway Co., 5 Fed. Rep. 641; Chicago Ry. Co. v. Dey, 35 Fed. Rep. 866; Railway Co. v. Smith, 15 Ga. 694; Peo v. Harper, 91 Ill. 357. The federal courts place great weight upon the fact that the general law granting the board, or commission, power to make rules or regulations, should also declare the violation of such rules or regulations, when promulgated to be a misdemeanor and prescribe the penalty therefor, instead of giving the board power to declare a violation of the rules a misdemeanor and prescribe the penalty. *Ex parte* Cox, 63 Cal. 21; United States v. Breen, 40 Fed. Rep. 402; United States v. City of Moline, *supra*.

Though in the above cases questions of a *quasi*-legislative nature have been quite generally delegated to boards, commissions, and executive officers or departments, yet that power is not without limitations. In Michigan an ordinance which left it within the discretion of a mayor or police officer to regulate processions in the streets of a city was declared unconstitutional "because it leaves the power of permitting or restraining processions and their course to an unregulated official discretion, when the whole matter, if regulated at all, must be permanent legislation." Matter of Frasee, 63 Mich. 396. Also, where a law or ordinance delegates to a board an unregulated official discretion it is unconstitutional. Cicero Lumber Co. v. Cicero, 176 Ill. 9. In the case of O'Neil v. Insurance Co., 166 Penn. St. 72, it was declared a delegation of legislative authority to direct the insurance commissioner to draw a standard policy to be used by all insurance companies. In the opinion the court gives five reasons why the act is unconstitutional. First, the act does not fix the terms and conditions of the policy, the use of which it commands. Second, it delegates the power to prescribe the form of the policy and the conditions and restrictions to be added to and made part thereof, to a single individual. Third, the appointee clothed with the power is named only by his official title. Fourth, the appointee is not required to report to the legislature; his report is filed in his own office and never becomes an integral part of the statutes. Fifth, the legislature had no control over the form when filed, and had no knowledge of the act they required all companies to follow, and for the violation of which they prescribed a heavy penalty. The above decision does not seem to have given so much weight as the federal courts to the fact that the general law made the violation of the act a misdemeanor and prescribed a penalty for its violation. But two states, other than Oregon, have been found to have state laws regulating the trade of barber—Missouri and Nebraska. Each leaves to a board of examiners the determining of the necessary qualifications of a barber and the granting of licenses, but in each state the law is more explicit in its direction of the course to be pursued by the board and in its limitations upon their power than is the Oregon law. The Nebraska law went into effect in 1889 and the Missouri law in 1900.—*Yale Law Journal.*

BOOKS RECEIVED.

Briefs on the Law of Insurance. By Roger W. Cooley. In five volumes. St. Paul, Minn. West Publishing Co., 1905. Sheep. Price $27.00. Review will follow.

A Manual Relating to Special Verdicts and Special Findings by Juries, Based on the Decisions of all the States. By George B. Clementson, of the Wisconsin Bar. St. Paul, Minn. West Publishing Co., 1905. Sheep, pp. 411. Price $3.75. Review will follow.

American Railroad Rates. By Walter Chadwick Noyes, a Judge of the Court of Common Pleas in Connecticut; President of New London Northern Railway Company; Author of "The Law of Intercorporate Relations." Boston. Little, Brown and Company, 1905. Cloth, 12 mo. pp. 276. Price $1.50. Review will follow.

Roman Water Law. Translated from the Pandects of Justinian. By Eugene F. Ware, Esq., of the Topeka Bar. This volume contains all of the Roman Law, concerning fresh water, found in the Corpus Juris Civilis. St. Paul, Minn. West Publishing Co., 1905. Half Morocco. Review will follow.

HUMOR OF THE LAW.

In connection with lawyers trying to confuse experts in the witness box in murder trials a case is recalled where the lawyer looked quizzically at the doctor and said:

"Doctors sometimes make mistakes, don't they?"

"The same as lawyers," was the reply.

"But doctors' mistakes are buried six feet under ground," said the lawyer.

"Yes," said the doctor, "and lawyers' mistakes sometimes swing six feet in the air."

Many are the stories yet told at Oxford of Master Jowett's abrupt and formidable wit. At a dinner at Balliol, at Master Jowett's table, the talk ran upon the comparative gifts of two Balliol men who had been respectively made a judge and a bishop. Professor Henry Smith, famous in his day for his brilliance, pronounced the bishop to be the greater man of the two for this reason: A judge at the most, can only say, 'You be hanged,' whereas a bishop can say, 'You be damned.'" "Yes," said Master Jowett, "but if the judge says, 'You be hanged,' you are hanged."—*T. W. Higginson in the Atlantic Monthly.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABATEMENT AND REVIVAL—Conversion of Good Will of Defunct Corporation.—Under Rev. St. 1898, §§ 1764, 4253, a claim against a director of a defunct corporation for wrongfully converting the good will held to survive the death of the director.—Lindemann v. Rusk, Wis., 104 N. W. Rep. 119.

2. ACCIDENT INSURANCE—Burden of Proving. False Statements in Application.—In an action on an employer's indemnity policy, the burden is on defendant to show the falsity of any statements in the application.—Goldman v. Fidelity & Deposit Co. of Maryland, Wis., 104 N. W. Rep. 80.

3. ACCORD AND SATISFACTION—Written Receipt.—When an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced by a written receipt for the lesser sum in satisfaction of the greater, there is a valid and irrevocable discharge of the debt.—Dreyfus & Co. v. Roberts, Ark., 87 S. W. Rep. 641.

4. ACTION—Money Had and Received.—Where one unlawfully converts to his own use money, the party injured may waive the tort and treat the transaction as a loan to the tort feasor.—Courter v. Pierson, N. J., 61 Atl. Rep. 81.

5. ADVERSE POSSESSION—What Constitutes.—One who purchases and takes possession of land for the statutory period held to acquire title by adverse possession.—King v. See, Ky., 87 S. W. Rep. 758.

6. ANIMALS—Agister's Lien.—An agister's lien does not exist at common law.—Tandy v. Elmore-Cooper Live Stock Commission Co., Mo., 87 S. W. Rep. 614.

7. ANIMALS—Impounding by De Facto Officer.—Owner of animals impounded by *de facto* officer cannot escape payment of fees, regardless of the officer's right thereto as against the municipality.—White v. Town of Clarksville, Ark., 87 S. W. Rep. 630.

8. APPEAL AND ERROR—Appeal from Justice Court.—The supreme court cannot, on appeal from district court, directly review proceedings in the cause before a justice.—Simmons v. Chicago, B. & Q. Ry. Co., Iowa, 103 N. W. Rep. 954.

9 APPEAL AND ERROR—Collateral Attack on Judgment.—An objection that a judgment improperly awarded execution jointly and severally against defendants named held not available when made for the first time on appeal.—Sanger Bros. v. Corsicana Nat. Bank, Tex., 87 S. W. Rep. 737.

10. APPEAL AND ERROR—Equity Jurisdiction.—A party who seeks a transfer of a cause from the law to the equity docket cannot complain of the exercise of jurisdiction by the chancery court.—Deidrich v. Simmons, Ark., 87 S. W. Rep. 649.

11. APPEAL AND ERROR—History of Texas as Evidence to Identify Grantee.—On an issue as to the identity of a grantee in a bounty warrant, held not prejudicial to refuse to permit a party to read in evidence from the history of Texas.—Allen v. Halstead, Tex., 87 S. W. Rep. 754.

12. APPEAL AND ERROR—Instructions in Civil Action for Assault.—Where, in an action for assault, the only issue was whether defendant struck the plaintiff, an instruction that, if defendant struck the plaintiff, there was no justification, held harmless.—Gulbertson v. Hanson, Minn., 104 N. W. Rep 2.

13. APPEAL AND ERROR—Presumptions as to Instructions.—Where no instructions were requested, and no exceptions were taken to those given, it would be presumed that all material issues were properly submitted.—Borneman v. Chicago, St. P., M. & O. Ry. Co., S. Dak., 104 N. W. Rep. 208.

14 APPEAL AND ERROR—Where Preponderance of Evidence is Against Verdict.—A verdict based on conflicting evidence will not be interfered with on appeal, though it may appear that the preponderance of the evidence is against it.—Flynn v. St. Louis Transit Co., Mo., 87 S. W. Rep. 560.

15. APPEAL AND ERROR—Writ of Error.—Failure to file a brief of evidence before the time for hearing motion for new trial held not ground for dismissing a writ of error after respondent has participated in the hearing.—Rigall v. Sirmans, Ga., 51 S. E. Rep. 381.

16. ATTORNEY AND CLIENT—Authority to Compromise Claim.—Act of an attorney in compromising claim held binding upon the client.—Kelly v. Chicago & A. Ry. Co., Mo., 87 S. W. Rep. 583.

17. BANKRUPTCY—Bona Fide Purchaser of Note.—One who loaned money to the wife of a bankrupt to pay a mortgage on the bankrupt homestead, and received as security a note payable by the bankrupt to his wife, held a purchaser of the note in good faith for a present fair consideration, within Bankr. Act, July 1, 1898, ch. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).—Clarke v. Sherman, Iowa, 103 N. W. Rep 982.

18. BANKRUPTCY—Jurisdiction of Court of Bankruptcy.—A court of bankruptcy has jurisdiction under Bankr. Act July 1, 1898, ch. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), to determine rights of property in its possession.—Whitney v. Werman, U. S. S. C., 25 Sup. Ct Rep. 778.

19. BANKRUPTCY—Order Requiring Payment of Judgment.—Under Bankr. Act, ch. 541, § 67f, an order issued in supplemental proceedings less than four months before the filing of the petition, and requiring the bankrupt to pay a certain judgment, held to have been rendered void by the discharge.—Gardiner v. Ross, S. Dak., 104 N. W. Rep. 220.

20. BANKRUPTCY—Preferences.—Under Bankr. Act, ch. 541, § 60, subd. "b," the complaint in an action by a trustee in bankruptcy to recover the value of property of a bankrupt transferred as a preference need not allege any fact showing necessity for recovering the alleged preference.—Jackman v. Eau Claire Nat. Bank, Wis. 104 N. W. Rep. 98.

21. BANKRUPTCY—Preferences.—Whether a given transaction in the form of a recordable instrument con-

stitutes a preference, within the bankruptcy act, must be determined by the facts existing at the time of its execution.—Seager v. Lamm, Minn., 104 N. W. Rep. 1.

22. BANKRUPTCY—Title of Trustee to Choses in Action.—A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense to which they would have been liable in the hands of the latter.—Nebraska Moline Plow Co. v. Blackburn, Neb., 104 N. W. Rep. 178.

23. BOUNDARIES—Inconsistent Calls.—Where calls for boundary lines are irreconcilably inconsistent, they are to be given effect in the following: (1) natural objects; (2) artificial marks; (3) courses and distances.—Kleven v. Gunderson, Minn., 104 N. W. Rep. 4.

24. BREACH OF MARRIAGE PROMISE—Condonation.—Letter written by a woman to a man held not to constitute a condonation by the writer of the man's breach of promise to marry.—Mickens v. Phillips, Va., 51 S. E. Rep. 854.

25. BROKERS—Right to Commissions.—Deal by which a tenant in common conveyed the larger part of his premises to his co-tenant, retaining a small tract himself, held a sale, within the meaning of a contract by the former, employing a broker to sell the premises for him.—Burdon v. Briquelet, Wis., 104 N. W. Rep. 83.

26. BUILDING AND LOAN ASSOCIATION—Loan of Officers.—A building association making a loan to its treasurer is not precluded from a recovery by the failure of the treasurer to execute a note and mortgage for the loan.—Indiana Trust Co. v. International Building & Loan Association, Ind., 74 N. E. Rep. 683.

27. CANCELLATION OF INSTRUMENTS — Equitable Relief.—In a suit to set aside a transfer of real and personal property, held, that the trial court's adjustment of the equities between the parties was not erroneous.—Krause v. Krause, Wis., 104 N. W. Rep. 76.

28. CARRIERS—Delivery of Freight.—A carrier has a right to call on an unknown person claiming a shipment to identify himself, and, where a bill of lading has been issued, may demand its production.—Sellers v. Savannah F. & W. Ry. Co., Ga., 51 S. E. Rep. 398.

29. CARRIERS—Duty to Stop at Stations.—A passenger with means of ascertaining whether a train will deliver him at his destination held bound to avail himself of his opportunity to enter the right conveyance.—Texas & P. Ry. Co. v. Bell, Tex., 87 S. W. Rep. 730.

30. CARRIERS—Limitation of Liability.—A carrier may, by contract, exempt itself from liability for fire not attributable to its negligence.—Anderson v. Mobile & O. R. Co., Miss., 38 So. Rep. 661.

31. CARRIERS—Live Stock Shipment.—An instruction authorizing recovery of such damages as "might have" resulted from unreasonable delay or rough handling of a carrier held erroneous.—Ft. Worth & D. C. Ry. Co. v. James, Tex., 87 S. W. Rep. 730.

32. CARRIERS—Measure of Damages in Delayed Shipment of Grain.—A carrier, guilty of unreasonable delay in forwarding a shipment of grain, held liable for the difference between the market price at the time the grain should have arrived and at the time it did arrive.—Chicago, R. I. & P. Ry. Co. v. C. C. Mill Elevator & Light Co., Tex., 87 S. W. Rep. 753.

33. CARRIERS—Mistake in Contract of Shipment.—Contract between shipper and railroad agent for a rate, based on erroneous telegram, held binding on the company.—Central of Georgia Ry. Co. v. Gortatowsky, Ga. 51 S. E. Rep. 469.

34. CARRIERS—Validity of Stipulation Limiting Liability.—A recital in a bill of lading that the shipment was carried at a special rate, in consideration of a stipulation liquidating damages in case of loss, was insufficient alone to show a carriage at a reduced rate.—Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co., Mo. 87 S. W. Rep. 553.

35. CHARITIES—Appointment of Trustees.—Where a charitable trust is created by grant, the donor may appoint trustees and confer power of appointment of their successors upon the trustee or the beneficiaries.—Thompson v. Hale, Ga., 51 S. E. Rep. 383.

36. CHATTEL MORTGAGES — Conversion. — A stranger who converts cattle covered by duly recorded mortgage held liable, although the conversion took place in a state other than that where the mortgage was recorded.—Scaling v. Bank, Tex., 87 S. W. Rep. 715.

37. CHATTEL MORTGAGES—Foreclosure.—In a suit to foreclose a chattel mortgage, a judgment of foreclosure against a certain defendant is not authorized, in the absence of a finding in favor of plaintiff for a foreclosure against such defendant.—Martin v. Berry Bros., Tex., 87 S. W. Rep. 712.

38. CONSTITUTIONAL LAW—Intoxicating Liquors.—Rev. St. ch. 29, § 64, prohibiting suits to recover the price of liquors bought in another state to be illegally sold in the state, does not deny any person within its jurisdiction the equal protection of the laws.—Corbin v. Houlehan, Me., 61 Atl. Rep. 131.

39. CONSTITUTIONAL LAW — Statute Requiring Conditional Sales to be Recorded.—Laws, 1893, p. 56, ch. 36 § 1, re-enacted as Rev. Civ. Code, § 1315, requiring conditional sales to be recorded, held not unconstitutional as a deprivation of property without due process of law.—Pringle v. Canfield, S. Dak., 104 N. W. Rep. 223.

40. CONTRACTS—Architect's Certificate. — A building contractor held entitled to recover on the contract, though he had not procured a certificate from the architect, as called for by the contract.—Halsey v. Waukesha Springs Sanitarium, Wis., 104 N. W. Rep. 94.

41. CONTRACTS—Public Policy.—Where a contract violates the positive legislation or the public policy of the state of the forum, it will not be enforced in that state, though valid where made.—Corbin v. Houlehan, Me., 61 Atl. Rep. 131.

42. CONTRACTS—Ratification.—Acts of directors of an insurance company held to have ratified an arrangement by its president and secretary, by which certain bank stock and certificates of deposit were accepted in payment of a deposit in an insolvent bank.—Fidelity Ins. Co. v. German Sav. Bank, Iowa, 103 N. W. Rep. 958.

43. CONTRACTS—Rescission.—One party cannot rescind a contract by merely giving notice of its intent so to do, without the agreement of the other.—Central of Georgia Ry. Co. v. Gortatowsky, Ga., 51 S. E. Rep. 469.

44. CONTRACTS—Variance as to Amount Due Under Contract. — Where plaintiff claims he is entitled to a given sum under a contract, he is entitled to recover, though the proof shows that he was entitled to a smaller sum, unless the variance has misled defendant.—Nichols v. Whitacre, Mo., 87 S.W. Rep. 594.

45. CONTRACTS—Variance by Parol.—A contract for decorating held not subject to variance by parol proof that it was agreed that plaintiff's manager should supervise the work.—Southwestern Telegraph & Telephone Co. v. Paris, Tex., 87 S. W. Rep. 724.

46. CORPORATIONS—Action Against Directors.—Where a director of an insolvent bank has been appointed receiver, and stockholders obtained leave to sue the directors for misconduct, it was proper to join the receiver and the corporation as defendants.—Welosky v. Quaterman, Ga., 51 S. E. Rep. 426.

47. CORPORATIONS — Compensation for Directors.—A director of a corporation cannot recover for services rendered unless there was an express contract of employment before they were performed. — Brophy v. American Brewing Co., Pa., 61 Atl. Rep. 123.

48. CORPORATIONS—Demand by Mail for Examination of Books.—Written demand of minority stockholders for opportunity to examine books and papers, properly mailed, will be presumed to have been received.—Neubert v. Armstrong Water Co., Pa., 61 Atl. Rep. 123.

49. CORPORATIONS—Presumption as to Right to Contract.—In an action against a corporation on the contract the presumption arises that the contract is within the power of the corporation, unless the petition state

facts showing the contrary.—Willow Springs Irr. Dist. v. Wilson, Neb., 104 N. W. Rep. 165.

50. CRIMINAL EVIDENCE — Declarations of Co-Conspirators. — Statement of a confederate, or a co-conspirator, accompanying acts in furtherance of the conspiracy, are admissible as against all other parties to the conspiracy.—Schutz v. State, Wis., 104 N. W. Rep. 90.

51. CRIMINAL EVIDENCE— Handwriting Expert.—A handwriting expert, though entitled to testify by comparison that a certain writing was a normal handwriting, held not entitled to give his opinion that it did not bear evidence of being a guided hand.—Colbert v. State, Wis., 104 N. W. Rep. 90.

52. CRIMINAL LAW—Certificate of Justice. — A defendant after conviction in the circuit court on appeal from a justice held not entitled to object to the justice's record on the ground that there was no certificate of the justice.—Calhoun v. State, Miss., 38 So. Rep. 660.

53. CRIMINAL TRIAL—Impeachment of Witness.—Where only one witness is sought to be impeached, it is not improper, on instructing as to the weight to be given to the testimony of impeached witnesses, to refer to such witness specifically.—Stevens v. People, Ill., 74 N. E. Rep. 786.

54. CRIMINAL TRIAL—Judge Communicating with Jury. —Action of presiding judge, in holding communication with the jury in the absence of accused and his counsel, held reversible error.—Havenor v. State, Wis., 104 N. W. Rep. 116.

55. CRIMINAL TRIAL—Presumptions in Construing Contract in Criminal Case.—Any presumption to be brought into play in construing a contract in a criminal case will be taken in favor of accused.—Keller v. State, Tex., 87 S. W. Rep. 669.

56. DAMAGES — Vexatious Contest by Life Insurance Company.—An allowance of 10 per cent. damages and $200 attorney's fees, because of defendant's unwarranted and vexatious defense to a liability on a policy, held not excessive.—Williams v. St. Louis Life Ins. Co., Mo., 87 S. W. Rep. 499.

57. DAMAGES—Where Speculative and Remote.—A depreciation in the market value of thoroughbred and high-grade cows, by reason of being gotten with calves by common stock bulls, is not too remote to constitute a valid basis for recovery.—Baldwin v. Richardson, Tex., 87 S. W. Rep. 746.

58. DEEDS — Boundaries. — Boundaries of land conveyed as lots or blocks in a town plat are limited to those designated by the plat, the plat will yield to clearly shown intent of the parties at variance therewith. — Owsley v. Johnson, Minn., 103 N. W. Rep. 903.

59. DEEDS — Delivery to Take Effect after Grantor's Death.—Delivery by father of a deed of land in favor of his son to a third person, with directions to keep the deed until the grantor's death and to then have it recorded, was a transaction in the nature of a voluntary settlement.—Thompson v. Calhoun, Ill., 74 N. E. Rep. 775.

60. DEPOSITIONS—Failure of Party Giving Notice to Appear.—Where, after notice of the taking of a deposition, the party giving it does not appear, the opposite party must on his own part give notice, and may not cross-examine the witness who was not examined in chief.—Hosch Lumber Co. v. Weeks, Ga., 51 S. E. Rep. 439.

61. DEPOSITIONS—Interrogatories.—Answers to interrogatories other than those attached to a witness' deposition held properly excluded, without a written objection, and notice given before trial.—Sparks v. Taylor, Tex., 87 S. W. Rep. 740.

62. DIVORCE—Condonation.—Where a marital offense constituting a cause for divorce is condoned, but the misconduct on the part of the offending spouse is thereafter repeated, the condonation is abrogated, and the former cause for divorce is revived.—Edleman v. Edleman, Wis., 104 N. W. Rep. 56.

63. DIVORCE—Division of Property.—Where the title to property has been cut off by the nonpayment of taxes, it cannot be taken into account in making a division of property between spouses in a divorce proceeding.—Edleman v. Edleman, Wis., 104 N. W. Rep. 56.

64. DOWER—Assignment.—Where land belonging to the estate of decedent is set apart as dower, and the widow enters into possession, it is not essential that there should be an order formally assigning the land.—Callaway v. Irvin, Ga., 51 S. E. Rep. 477.

65. ELECTIONS—Ballots —That a voter has attached a combination of stickers covering the names of several candidates, without attaching the stickers separately, does not render the ballot invalid.—Roberts v. Bope, N. Dak., 103 N. W. Rep. 935.

66. EMINENT DOMAIN—Right to Exercise Power.—A corporation, including a purpose of a purely private business among the purposes of its organization, cannot exercise a power of eminent domain, though organized before Acts 1904, No. 120. — Louisiana Navigation & Fisheries Co. v. Doullut, La., 38 So. Rep. 613.

67. EQUITY—Affirmative Relief.—Where a cross-bill seeks no relief, but sets out a case entitling cross-complainant to affirmative relief, such relief may be granted, though the original bill itself be dismissed. — Callahan v. Mercantile Trust Co., Mass., 74 N. E. Rep. 666.

68. ESTOPPEL—Misdescription of Premises.—Vendor of land, who misdescribed premises in the papers, held estopped to deny vendee's right to the premises of which he took possession.—Black v. Baskins, Ark., 87 S. W. Rep. 647.

69. EVIDENCE—Ancient Deeds. — That a deed is not ancient does not preclude its proof by a certified copy from the land records when the parties to it are not parties to the cause. — Dawson v. Town of Orange, Conn , 61 Atl. Rep. 101.

70. EVIDENCE—Best and Secondary Evidence. — In a suit to determine an adverse interest in land, a witness cannot state what connection he had with the land at the time of a certain town meeting; documentary proof of his title being the best evidence.—Dawson v. Town of Orange, Conn., 61 Atl. Rep. 101.

71. EVIDENCE—Res Gestae.—In an action to recover possession of a horse, statements made by the person from whom defendant obtained the horse, made thereafter in conversation with another, held inadmissible as *res gestæ*.—Vagts v. Utman, Wis., 104 N. W. Rep. 88.

72. EVIDENCE—Res Gestæ. — A statement made by plaintiff's fellow workman to defendant's pit boss, charging him with being the cause of the accident, to which he did not reply, held inadmissible as *res gestæ* or an admission of the defendant.—Wojtylak v. Kansas & T. Coal Co., Mo., 87 S. W. Rep. 506.

73. EXECUTION—Contempt. — Defendant in a motion for an order to show cause why he should not be punished for contempt in supplemental proceedings held entitled to present a defense arising after the making of the order.—Gardiner v. Ross, S. Dak., 104 N. W. Rep. 220.

74. EXECUTION—Writ of Possession.—Where a judgment is conditional on the reimbursement of certain expenses, the reimbursement must be made before a writ of possession can issue.—Martel v. Jennings-Heywood Oil Syndicate, La., 38 So. Rep. 612.

75. EXECUTORS AND ADMINISTRATORS—Erroneous Appointment.—Where the order appointing administrators was erroneous, but not void, they had, until the reversal of the order, all the authority of administrators rightfully appointed, and could sue in behalf of the estate.—Buckner's Adm'rs v. Louisville & N. R. Co., Ky., 87 S. W. Rep. 777.

76. FIRE INSURANCE—Adjustment.—In a suit on insurance policy by an assignee of the policy, defendant held not bound by an adjustment under the policy made after the assignment between the insurer and the assignor.—Georgia Co-op. Fire Ass'n v. Borchardt & Co., Ga., 51 S. E. Rep. 429.

77. FIRE INSURANCE—Liability of Insured for Assessment.—Member of a mutual fire insurance association, incumbering insured property contrary to the terms of the policy, held estopped to claim release from liability for assessments by reason of such incumbrance. — Nel-

son v. Farm Property Mut. Ins. Ass'n, Iowa, 103 N. W. Rep. 966.

78. GAMING—Speculation in Futures.—The legality of a purchase of merchandise for sale on speculation is not affected by the fact that the purchaser pledges the merchandise to secure the purchase money. — Jennings v. Morris, Pa., 61 Atl. Rep. 115.

79. GRAND JURY — Minutes of Grand Jury. — Stenographic reports and minutes of the grand jury, authorized to be made by Laws 1903, p. 136, ch. 90, are not official records, and as such receivable as independent evidence of the facts reported.—Havenor v. State, Wis., 104 N. W. Rep. 116.

80. GUARDIAN AND WARD—Action on Guardian's Bond. —In an action on a guardian's bond, judgment for the penalty of the bond should be entered before reference to the assessor to ascertain the sum for which execution shall issue.—Donaher v. Flint, Mass., 74 N. E. Rep 927.

81. GUARDIAN AND WARD—Natural Guardianship.—On the death of the parents of the child, the grandfather or grandmother, when next of kit., succeed to the infant's natural guardianship.—Holmes v. Derrig, Iowa, 103 N. W. Rep. 973.

82. HABEAS CORPUS—Irregularities.—Impaneling and swearing of a jury in petitioner's absence, and the discharge of one of the jurors, consented to in petitioner's presence by his counsel, held no ground for petitioner's release on *habeas corpus* after conviction.—*In re* Shinski, Wis., 104 N. W. Rep. 86.

83. HOMESTEAD—Nature of Estate. — Where testatrix devised her property to her husband for life, and there were no children, the family homestead descended to the husband for life, with remainder to the child of testatrix by a prior marriage. — *In re* Poseng's Estate, Minn., 104 N. W. Rep. 187.

84. HUSBAND AND WIFE—Suit Without Joining Husband.—In trespass to try title by a married woman, her husband not being joined, she must allege that her husband failed or refused to sue for her or to join with her. —Parks v. Worthington, Tex., 87 S. W. Rep. 720.

85. INJUNCTION—Contest Over Public Lands.—Where plaintiff claims a right to possession of land under a homestead filing, and the land is in adverse possession of defendants, he cannot resort to equity to recover possession by injunction.—Martinson v. Marzolf, N. Dak., 103 N. W. Rep. 937.

86. JUDGMENT—Bar of Ejectment.—An action in *assumpsit* by plaintiffs for use and occupation under a certain license, which was dismissed, held not a bar to a subsequent action of ejectment for the same premises.—Chicago Terminal R. Co. v. Winslow, Ill., 74 N. E. Rep. 815.

87. JUDGMENT—Effect of Stay of Execution on Lien.—The lien of a judgment is continued in a stay bond, and relates back to the rendition of the judgment, so as to protect the judgment creditor against subsequent liens or conveyances by the judgment debtor.—Cook v. Martin, Ark., 87 S. W. Rep. 625.

88. JUDGMENT—Motion to Vacate for Irregularities.—On motion to vacate a judgment for irregularity, relief will not be granted, if the moving party has waived the irregularity, or relief would be inequitable.—Martinson v. Marzolf, N. Dak., 103 N. W. Rep. 937.

89. JUDGMENT—Res Judicata.—Estoppel by judgment is no defense where in a former suit, jointly instituted by plaintiff and others as to the same matter, defendant interposed several distinct defenses, and it does not appear on which defense the judgment was rendered.—Callaway v. Irvin, Ga., 51 S. E. Rep. 477.

90. JUDGMENT—Res Judicata.—The plea of *res judicata* applies to the points on which the court has pronounced judgment, and to every point which properly belonged to the subject matter of litigation.—First Nat. Bank v. Gibson, Neb., 104 N. W. Rep. 174.

91. JUDGMENT—Res Judicata.—A judgment in a suit to enjoin the transaction of a banking business under the name of a defunct corporation held not *res judicata* in a subsequent action for wrongful appropriation of the good will of the defunct corporation. — Lindemann v. Rusk, Wis., 104 N. W. Rep. 119.

92. LANDLORD AND TENANT—Forcible Entry and Detainer.—Any act on the part of a tenant disavowing the title of the landlord and claiming a superior hostile title or ownership, amounting to a repudiation of the tenancy, constitutes a forfeiture.—Barnewell v. Stephens, Ala., 38 So. Rep. 662.

93. LANDLORD AND TENANT—Payment of Rents as Alimony.— Where defendant consented to a divorce decree requiring him to pay certain rents to his divorced wife, in D county, an action to recover such rents was properly brought against him in that county. — Connellee v. Werenskoid, Tex., 87 S. W. Rep 747.

94. LANDLORD AND TENANT—Possession. — In a proceeding against a tenant and a sub-tenant for possession, a judgment for possession should be entered against both tenants, and a judgment for double rent against the original tenant only.—Fletcher v. Fletcher, Ga., 51 S. E. Rep. 418.

95 LIBEL AND SLANDER—Mistake.—Where a publication was libelous *per se* as to plaintiff, malice will be presumed, though the reference therein to plaintiff was the result of a mistake on the part of the defendant's editor —Farley v. Evening Chronicle Pub. Co , Mo., 87 S. W. Rep. 565.

96. LIFE INSURANCE—Assignment of Policy.- The assignor of a life policy was estopped to deny that the assignment was not valid because not indorsed on policy, as required by the terms thereof. — Connecticut Mut. Life Ins. Co. v. Tucker, R. I., 61 Atl. Rep. 142.

97. LIFE INSURANCE—Effect of Incontestable Clause.—Insurer held precluded by an incontestable clause to defend a liability on the policy, after it had been in force two years, on the ground of misrepresentation and fraud.—Williams v. St. Louis Life Ins. Co., Mo., 87 S. W. Rep. 499.

98. LIMITATION OF ACTIONS — Absence from State.—Where a person against whom a cause of action has accrued departs from the state and establishes his residence elsewhere, limitations cease to run in his favor from the date of his departure. Rev. Codes 1899, § 5210 —Paine v. Dodds, N. Dak., 103 N. W. Rep. 931.

99. LIMITATION OF ACTIONS — Absence of Mortgagee from State.—The absence of the mortgagee from the state after he has parted with the title does not prevent the running of limitations in favor of his grantee.—Colonial & U. S. Mortg. Co. v. Northwest Thresher Co., N. Dak., 103 N. W. Rep. 915.

100. LIMITATION OF ACTIONS — Burden of Showing Foreign Statute.—Where an injury to a miner sued for occurred in the company's mines in Kansas, the burden of showing that the action was fully barred by the statutes of limitation was on the defendant.—Wojtylak v. Kansas & T. Coal Co., Mo., 87 S. W. Rep. 506.

101. LIS PENDENS—Notice.—A purchaser of property actually in litigation is bound by the judgment or decree, irrespective of notice of the pendency of the proceeding.—Tice v. Hamilton, Mo., 87 S. W. Rep. 497.

102. MANDAMUS—Examination of Corporation's Books. —Rights of minority stockholders to examine books and papers of corporations may be enforced by *mandamus*.— Neubert v. Armstrong Water Co., Pa., 61 Atl. Rep. 123.

103. MANDAMUS — Review of Judicial Action. — *Mandamus* will not lie to require a judge to dissolve a temporary injunction, which he has refused to do, on the ground that, in his opinion, there is equity in the bill for an injunction. — Chatfield v. Lenawee Circuit Judge, Mich., 104 N. W. Rep. 45.

104. MANDAMUS—Taxpayer's Action.—*Mandamus* will be denied where the issuance will create confusion and not promote substantial justice, though relator has a clear legal right for which *mandamus* is the proper remedy.— People v. Olsen, Ill., 74 N. E. Rep. 785.

105. MANDAMUS—To Compel Construction of Street.— An owner of property may procure a writ of *mandamus* to compel the construction by the municipal authorities

of an adjacent street.—McCarthy v. City of Boston, Mass., 74 N. E. Rep. 659.

106. MASTER AND SERVANT—Assumed Risk.—A servant working on a boiler on a railroad track in the master's yard where switching was being done assumed the risk of being injured by a train.—Breeze v. MacKinnon Mfg. Co., Mich., 103 N. W. Rep. 908.

107. MASTER AND SERVANT—Contract Releasing Railroad from Liability for Negligence.—Sleeping car porter's contract releasing railroads from liability for injuries to him held a complete defense to an action against a railroad company for injuries to him, without regard to whether the railroad's negligence was gross or slight.—Chicago, R. I. & P. Ry. Co. v. Hamler, Ill., 74 N. E. Rep. 705.

108. MASTER AND SERVANT—Contributory Negligence of Parent.—Where the death of an infant was caused by the negligence of his employer, the fact that the infant's father consented to the employment did not defeat his right to recover.—Virginia Iron, Coal & Coke Co. v. Tomlinson, Va., 51 S. E. Rep. 362.

109. MASTER AND SERVANT—Contributory Negligence Question for Jury.—In an action by a coal mine employee for injuries sustained while attempting to leave the elevator cage at the bottom of the mine, the question of his contributory negligence held for the jury.—Illinois Third Vein Coal Co. v. Cioni, Ill., 74 N. E. Rep. 751.

110. MASTER AND SERVANT—Duty to Keep Car-Step in Repair.—It was the duty of a railroad company to keep a step on a car used by servants in suitable repair, and to see that it was of sufficient strength.—Smith v. Thomson-Houston Electric Co., Mass., 74 N. E. Rep. 664.

111. MASTER AND SERVANT—Employment of Single Women Only.—An employer has a right to employ single women only, and if a married woman contracts to serve him and conceals the fact of her marriage, he may avoid the contract.—Parks v. Tolman, Mo., 87 S. W. Rep. 576.

112. MASTER AND SERVANT—Engineer's Right to Assume Track in Good Condition.—A railroad engineer has a right to assume that the track is in good condition, unless he has actual knowledge to the contrary.—Southern Ry. Co. v. Sittasen, Ind., 74 N. E. Rep. 898.

113. MASTER AND SERVANT—Liability for Tort of Servant.—Vendor of a stove, sending his servants to set it up in the vendee's house, held responsible for their negligence.—Crandall v. Boutell, Minn., 103 N. W. Rep. 890.

114. MASTER AND SERVANT—Safe Place to Work.—On the issue of whether the place in which a servant was working was reasonably safe, evidence as to conditions of similar places during past years held properly excluded.—Mueller v. Northwestern Iron Co., Wis., 104 N. W. Rep. 67.

115. MASTER AND SERVANT—Volunteer.—Plaintiff, representing himself and the purchasers of a threshing machine, and assisting to adjust certain parts thereof at the request of defendant's servant, held not a mere volunteer.—Meyer v. Kenyon-Rosing Mach. Co., Minn., 104 N. W. Rep. 132.

116. MUNICIPAL CORPORATIONS—Apportionment Warrants.—The issuance of an apportionment warrant for a municipal improvement against the grantor of the record owner of the property held insufficient to create a lien thereon.—Voris' Exrs. v. Gallaher, Ky., 87 S. W. Rep. 775.

117. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A city may be liable for dangers, adjacent to and not in a sidewalk proper, which it permits to exist to the peril of passers.—Rea v. Sioux City, Iowa, 103 N. W. Rep. 949.

118. MUNICIPAL CORPORATIONS—Defective Streets.—Where an accident was caused by a defect in a city street, the fact that a city contractor was required to keep the street in repair for three years is no defense, where the accident occurred within one year.—Harvey v. City of Chester, Pa., 61 Atl. Rep. 118.

119. MUNICIPAL CORPORATIONS—Tax Sales.—While a municipality may have property sold for payment of its taxes, property forfeited to state must be sold to pay state and municipal taxes due.—*In re* Linder, La., 38 So. Rep. 610.

120. MUNICIPAL CORPORATIONS—Writ for Vacation of Assessment.—A writ for the vacation of an assessment for a municipal improvement is not a writ of right, but will be issued only on a showing that substantial justice requires it.—Harwood v. Donovan, Mass., 74 N. E. Rep. 914.

121. NEGLIGENCE—Instruction Assuming a Controverted Fact.—In an action for injuries to a child, who walked into a pool of hot water on defendant's premises, an instruction held not erroneous on the theory that it assumed the existence of controverted facts.—Brinkley Car Works & Mfg. Co. v. Cooper, Ark., 87 S. W. Rep. 645.

122. NEGLIGENCE—Question for Jury.—The question of contributory negligence will not be taken from the jury, unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted evidence.—Strauss v. United Rys. & Electric Co., Md., 61 Atl. Rep 137.

123. NEGLIGENCE—Sounding of Whistle.—An allegation characterizing an act as having been "carelessly and negligently done" is sufficient against a demurrer.—Lake Erie & W. R. Co. v. Fike, Ind., 74 N. E. Rep. 636.

124. NEW TRIAL—Errors in Instructions.—To render available as a cause for a new trial that the court erred in giving certain instructions, all the instructions named must be incorrect.—Chicago Furniture Co. v. Cronk, Ind., 74 N. E. Rep. 627.

125. NOTICE—Sufficiency.—Service by mailing is insufficient, where the registered letter containing the notice arrived one day too late.—Dalton v. St. Louis, M. & S. E. Ry. Co., Mo., 87 S. W. Rep. 610.

126. PARTITION—Attorney's Fees.—Where partition proceedings are amicable, the court should allow the attorneys a reasonable fee, to be paid by the parties in proportion to their interests.—Johnson v. Emerick, Neb. 104 N. W. Rep. 169.

127. PARTNERSHIP—Effects Taken Into Custody by Court of Equity.—While taking partnership effects into the custody of a court of equity is a stringent measure, it rests largely within the discretion of the court.—Gillett v. Higgins. Ala., 38 So. Rep. 664.

128. PLEADING—Amendment After Trial.—Where parties voluntarily litigate issues of fact on which the court bases conclusions of fact, it can amend the pleadings after trial in accordance with those facts.—Maul v. Steele Minn., 104 N. W. Rep. 4.

129. PLEDGES—Advancements.—Where defendants held plaintiff's stock as a pledge for advancements, they could not cut off plaintiff's rights by a mere notice to pay the advancements within a certain time.—Groeltz v. Cole, Iowa, 103 N. W. Rep. 977.

130. PRINCIPAL AND AGENT—Unauthorized Contract.—A principal is not liable on a contract of his agent executed in the name of the principal, where the agent was not authorized by the principal to enter into the contract.—Quale v. Hazel, S. Dak., 104 N. W. Rep. 215.

131. PUBLIC LANDS—Right to Profit by Mistake of Land Department.—A patentee of part of a fractional section, whose patent, through carelessness of the Land Department, refers to the original survey, though a resurvey had been made, cannot recover from a subsequent patentee under the second survey all the land lying east of a certain meander line as shown on the earlier survey.—Gleason v. White, U. S. S. C., 25 Sup. Ct. Rep. 782.

132. RAILROADS—Frightening Horses.—The whistling of a locomotive to warn operatives of the train that it was about to start held not negligence.—Lake Erie & W. R. Co. v. Fike, Ind., 74 N. E. Rep. 636.

133. RAILROADS—Killing Stock.—Where suit was brought against a railroad for killing stock, and the declaration failed to allege ownership thereof, it was subject to special demurrer.—South Georgia Ry. Co. v Ryals, Ga., 51 S. E. Rep. 428.

134. RECEIVERS—Right to Sue Outside of State.—Receivers of a corporation cannot be empowered to sue in

a foreign jurisdiction to realize its assets, where he was appointed in a suit to enforce liens and subject property to claims of creditors.—Great Western Min. & Mfg. Co. v. Harris, U. S. S. C., 25 Sup. Ct. Rep. 770.

135. RELIGIOUS SOCIETIES — Jurisdiction of Courts.—The courts will not review the proceedings of church tribunals to decide whether they are regular or within their ecclesiastical jurisdiction, nor decide on the membership or spiritual status of persons belonging to religious societies.—Bonacum v. Murphy, Neb., 104 N. W. Rep. 180.

136. REMAINDER—Dower. — Where land had been set apart to a widow as dower, the right to enjoy the reversionary interest is postponed, and prescription will not run against the reversioners until her death.—Callaway v. Irvin, Ga., 51 S. E. Rep. 477.

137. REMAINDER—Trust Deeds. — Where a trustee of certain real estate did not represent the remaindermen on sale of their interest in the land, their right of action did not accrue until the death of the life tenant.—Smith v. McWhorter, Ga., 51 S. E. Rep. 474.

138. SALES—Acceptance.—A vendee, who retains goods and consumes them without objection, admits that they comply with the terms of his purchase as to quality.—Cohen v. Hawkins, Neb., 104 N. W. Rep. 179.

139. SCHOOLS AND SCHOOL DISTRICTS—Children of Foster Parents.—A foster parent is entitled to *mandamus* to compel the board of education to admit his child to attendance without payment of tuition, though the child may not have been legally adopted. — McNish v. State, Neb., 104 N. W. Rep. 186.

140. SPECIFIC PERFORMANCE—Sufficiency of Tender.—Where, in an action for specific performance, it appeared that plaintiff had had the use of the land after tendering the price, which was not brought into court, he was chargeable with interest on the amount of the tender.—Rankin v. Rankin, Ill., 74 N. E. Rep. 763.

141. STATUTES—Construction.—Statutes are not to be so construed as to interfere with vested rights if their terms admit of any other reasonable construction.—Jersey City v. North Jersey St. Ry. Co., N. J., 61 Atl. Rep. 95.

142. STREET RAILROADS—Care Required of Motorman.—The exercise of care on the part of the motoneer has special reference to the rate of speed, his control over the car, and his opportunity to observe that a vehicle was about to cross the track.—Smith v. Minneapolis St. Ry. Co., Minn., 104 N. W. Rep. 16.

143. STREET RAILROADS—Injury to Pedestrian.—Negligence of a street railway company is not inferred from the mere fact that a car struck and injured a pedestrian walking along the track.—Garvick v. United Rys. & Electric Co., Md., 61 Atl. Rep. 138.

144. STREET RAILROADS—Rights of Bicyclist Riding Close to Track.—If a traveler on a street on which cars are operated selects a path subjecting him to the liability of being struck by a passing car, he is bound to use reasonable care.—Kerr v. Boston Elevated Ry. Co., Mass., 74 N. E. Rep. 669.

145. SUBROGATION—Payments at Void Sale.—A bidder at a void sale in partition who made a payment which was applied to the satisfaction of a tax lien on the land held subrogated to the rights of the holder of the lien.—Liverman v. Lee, Miss., 38 So. Rep. 658.

146. TAXATION—Assessment.—Where an assessment for taxes, was void for want of description, three years' record of a tax deed held not to preclude the owner from contesting the validity thereof, under Rev. Pol. Code, § 2214.—Moran v. Thomas, S. Dak., 104 N. W. Rep. 212.

147. TAXATION—Nonresident Trustee.—Where trust estate is assessed for a certain value as against joint trustees, one of whom is a nonresident, and is illegal as to such trustee, the total amount cannot stand against the resident trustee, though it does not exceed the value of one-half of the trust estate.—People v. Wells, N. Y., 74 N. E. Rep. 878.

148. TAXATION—Payment of Taxes.—It is the duty of a purchaser at a tax sale to pay the unpaid taxes for prior years and taxes subsequently levied on the property.—Harding v. Auditor General, Mich., 104 N. W. Rep. 39.

149. TAXATION—Sale Under Invalid Assessment.—Where an assessment was invalid, and the purchaser at tax sale, in whose name the property was assessed, never completed his purchase, and the property was adjusted to the state, the title is in the state.—*In re* Lindner, La., 38 So. Rep. 610.

150. TAXATION—Tax Deeds.—A purchaser at a tax sale by the wife of the tenant for life suffering the land to be sold for nonpayment of taxes held to amount only to a payment of taxes.—Blair v. Johnson, Ill., 74 N. E. Rep. 747.

151. TAXATION—Transfer Tax.—The exercise of a testamentary power of appointment which transfers nothing not given to the transferee under such will by the will creating the power is not subject to tax.—*In re* Lansing's Estate, N. Y., 74 N. E. Rep. 882.

152. TRIAL—Breach of Contract in Conveyance of Land.—A vendee of real estate, while in possession under contract of purchase, cannot sue to recover the price for breach of contract, together with damages, without a rescission and surrender of possession.—Nolde v. Gray, Neb., 104 N. W. Rep. 165.

153. TRUST—Enforcement of Parol Trust.—Parol trust to reconvey property conveyed to the trustee without consideration, and solely for the purpose of reconveyance, held enforceable by the beneficiary, notwithstanding the statute of frauds.—Gallagher v. Northrup, Ill., 74 N. E. Rep. 711.

154. VENDOR AND PURCHASER—Contract to Sell Land.—Contract to sell land to three verdees construed, and held, that the vendor purchasing interest of third vendee could not assert title to the one-third assigned to the other vendees.—Ballard v. Anderson, Minn., 103 N. W. Rep. 900.

155. VENDOR AND PURCHASER—Prayer for Rescission of Sale.—A prayer for rescission of a sale of property by promoters to plaintiff corporation and for damages against one of them held not inconsistent.—Old Dominion Copper Mining & Smelting Co. v. Bigelow, Mass., 74 N. E. Rep. 658.

156. VENDOR AND PURCHASER—Refusal to Perform.—A vendor of land may, until he receives further advice to the contrary, rely on a notice given by the vendee that he will do nothing further to carry out the contract.—Claude v. Richardson, Iowa, 103 N. W. Rep. 991.

157. WARRANTY—Bounty Lands.—On an issue as to the identity of a person who received a donation under a bounty warrant, certain evidence held relevant.—Allen v. Halsted, Tex., 87 S. W. Rep. 754.

158. WATERS AND WATER COURSES—Diversion.—Landowner held entitled to obstruct a stream unnaturally diverted by his neighbor onto his land, though in so doing he also obstructs the natural flow of waters.—O'Connor v. Hogan, Mich., 104 N. W. Rep. 29.

159. WILLS—Mental Capacity.—A decree entered in accordance with the verdict of a jury on the issues of mental capacity and undue influence, in a suit to set aside the probate of a will, will not be set aside unless it is clearly against the weight of the evidence.—Johnson v. Farrell, Ill., 74 N. E. Rep. 760.

160. WILLS—Perpetuities.—Where part of the testamentary trust which was a complete scheme for the disposition of testator's property was void as a perpetuity, the entire trust would be held void and the property distributed under the statute of distribution. — Pitzel v. Schneider, Ill., 74 N. E. Rep. 779.

161. WITNESSES—Competency. — Where an administrator filed an equitable petition to cancel a deed of his grantor for incompetency and fraud, the grantee was incompetent to testify.—Parker v. Ballard, Ga., 51 S. E. Rep. 465.

162. WITNESSES—Impeachment.—In an action for injuries to a miner, evidence of a statement made by plaintiff's fellow workman to the pit boss, which he denied, held inadmissible for impeachment.—Wojtylak v. Kansas & T. Coal Co., Mo., 87 S. W. Rep. 506.